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FIRE INSURANCE LAW

THIS book has been planned to cover the subject "Law of Fire Insurance," which appears in the Fire Branch of the Associateship examination syllabus of the Chartered Insurance Institute.

Cases from which leading principles have been deduced are incorporated and questions which arise from time to time in actual business practice have also been given attention. In addition to its great value to students the book will also serve as a useful office reference book.

FIRE INSURANCE LAW

BY

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LONDON

SIR ISAAC PITMAN & SONS, LTD.

R. Cambray & Co. Ltd.

First published 1949

SIR ISAAC PITMAN & SONS, LTD.
PITMAN HOUSE, PARKER STREET, KINGSWAY, LONDON, W.C.2
THE PITMAN PRESS, BATH
PITMAN HOUSE, LITTLE COLLINS STREET, MELBOURNE
27 BECKETTS BUILDINGS, PRESIDENT STREET, JOHANNESBURG

ASSOCIATED COMPANIES

PITMAN PUBLISHING CORPORATION
2 WEST 45TH STREET, NEW YORK
205 WEST MONROE STREET, CHICAGO

SIR ISAAC PITMAN & SONS (CANADA), LTD.
(INCORPORATING THE COMMERCIAL TEXT BOOK COMPANY)
PITMAN HOUSE, 381–383 CHURCH STREET, TORONTO

MADE IN GREAT BRITAIN AT THE PITMAN PRESS, BATH
D9—(L.81)

THE CHARTERED INSURANCE INSTITUTE

INSURANCE HANDBOOK, No. 2

This handbook is issued under the authority of The Chartered Insurance Institute and is designed specially for the use of students.

PREFACE

PROTECTION and not litigation is what the public want when they arrange insurance. This is well understood by insurance companies who interpret their obligations according to the spirit rather than the letter of the bargain. For this reason, legal technicalities assume vital importance only on rare occasions, and many insurance officials perform their duties quite well without any detailed knowledge of the law.

Nevertheless, the undertakings into which insurance companies enter are contracts and, as such, depend for their validity and operation upon certain rules. It is clearly desirable that these should be known and applied by those engaged in the business, if only to save policy holders from the uncertainty that arises from a badly drafted or imperfectly understood contract.

The law of fire insurance is made up, in the main, of principles and rules culled from decided cases. Some are concerned with the interpretation of Acts of Parliament but, as few statutes affect fire insurance, most of the judgments represent the application of previously decided principles to fresh circumstances. In this way, the main body of fire insurance law has been built up, case upon case, until a most useful mass of precedents is available for future guidance.

It is always interesting to know something of the cases from which leading principles have been deduced: they have been mentioned in this book for the student's benefit and should be carefully studied. When continuity would have been broken by references to the leading cases in the appropriate chapters, brief references have been made to the facts or judgments in Appendix B.

The book has been planned to cover the subject "Law of Fire Insurance" which appears in the Fire Branch of the Associateship examination syllabus of the Chartered Insurance Institute. Questions which arise from time to time in actual business practice have also been kept well in mind, and it is hoped that, as an office reference book, it will have its uses.

The author is indebted to Mr. Charles Crisp, Mr. H. A. Latimer, and Mr. J. B. Cushing for various helpful suggestions and sincere thanks are also due to Mr. Brian Winch for his valuable labours as technical editor. At the same time, the author wishes to make it clear that he alone is responsible for the views expressed.

H. T.

LIVERPOOL,
September, 1948.

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CHAPTER I

THE FIRE INSURANCE CONTRACT

DEFINITION

A FIRE insurance contract is a legally binding agreement under which one party, known as the insurer, undertakes to indemnify the other party, the insured, in the manner and to the extent agreed, against loss by fire.

It is essential that the insurer's obligation to make good the destruction or the damage should not merely be incidental to some other obligation. Where in a lease or contract of bailment, the tenant or bailee gives an undertaking to make good any loss occasioned by fire, this is obviously subsidiary to the main purpose of the agreement and the contract is not one of insurance at all. Moreover, even when a contract is one of insurance and fire risks are covered it is not necessarily governed by fire insurance law. If, for instance, the contract covers a vessel or cargo against loss caused by perils of the seas as well as fire, the contract is one of marine insurance. On the other hand, an insurance evidenced by a policy in the usual marine form, if substantially against fire risks only, must be treated, for purposes of the Assurance Companies Acts, 1909 to 1946, as a fire insurance contract.

ESSENTIALS OF A CONTRACT

The essential features of a contract are—

1. An offer, intended to create legal relations, must be communicated to the offeree either by words or by conduct.

2. The offeree must accept the offer in its completeness before it lapses or is revoked. If the offeror indicates the manner in which the offer is to be accepted, the offeree must adopt that manner.

3. There must be evidence of the intention of the parties to enter into a contractual relation. This may be provided by the formal procedure of making the promise under seal, or it may be by the existence of consideration.

4. The parties must be recognized by the law as having the capacity to contract.

5. The consent of the parties must be real; that is to say, the parties must not have been threatened, unduly influenced, deceived or misled in a manner which would nullify their agreement.

6. The subject-matter of the contract must be legal and possible.

If one of these essentials is missing, the contract is void, voidable or unenforceable, depending upon the circumstances. A void "contract" is a contradiction in terms for it never can be a contract. A voidable contract is valid but, at the option of one of the parties,

can be avoided. An unenforceable contract is also valid, but cannot be enforced in court because of some evidential defect, i.e. a lack of evidence required by statute.

OFFER

An offer to enter into a contract of insurance may come from either the insurer or the prospective insured. The offer must be something more than a readiness to negotiate, such as may be expressed in an advertisement; it must be a complete proposition which needs only to be accepted by the other party. During the course of negotiations, offers may be made first by one and then by the other party. For example, a property owner makes an offer if he submits a proposal which simply requires acceptance: if, however, the insurer responds by offering to accept it subject to some alterations in the normal terms, he is really making a counter-offer which the property owner is free to accept or reject.

The issue of a prospectus or proposal form does not constitute an offer. Usually the sending of a completed proposal form by an intending insured does constitute an offer which may be accepted or declined, but where it is sent to an insurer merely to provide a description of a risk and to enable him to prepare a quotation, it is one of the stages in the negotiations and the offer will in all probability proceed from the insurer in the form of a quotation of the rate at which he is prepared to accept the risk.

An offer need not set out in detail all the terms of the proposed insurance. It is none the less complete if all the terms are known or determinable by some method other than future agreement.

An offer made through the post is not effective until it is received either by the offeree or his agent.

ACCEPTANCE

A response into which new terms are introduced, even though it purports to be an acceptance, is not so, but a counter offer, which in its turn needs to be accepted. An offer, once rejected, cannot be accepted unless it is renewed.

It is unusual for the offeror to signify that the acceptance must be communicated in a certain manner. The normal manner in which acceptance is intimated is by word of mouth or by letter. In *Henthorn* v. *Fraser*, [1892] 2 Ch. 27, 33, Lord Herschell said: ". . . where the circumstances are such that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted." Up to that moment the offer is revocable, but if revoked by post, the letter of revocation must be received before the letter of acceptance is posted. Conduct, such as the paying of the consideration, would usually be an effective acceptance, but conduct which does not bring the offeree's intention to the notice of the offeror will not suffice, unless the latter has

indicated that acceptance need not be communicated to him. An offeror cannot make the offeree's silence mean consent.

In connection with cases submitted by brokers to Lloyd's underwriters, a slip is prepared in the brokers' office setting out the essential facts. In *Thompson* v. *Adams* (1889), 23 Q.B.D., 361, it was held that the initialing of a slip by underwriters constituted acceptance and gave rise to a binding contract of insurance.

Acceptance concludes the contract; that is the legal way of saying that the time when, and the place where, the contract comes into existence are determined by the time and place of acceptance. The insurance may not come *into force* concurrently; it may be effective as from a specified date or as soon as a condition has been performed. The significance of this distinction is discussed in Chapter VI.

LAPSE OR REVOCATION OF OFFER

An offer that has not been accepted lapses on the death of either party. It may also be determined by a notice of revocation from the offeror. Where the offer is not revoked, it remains open until the time prescribed by the offeror, or if he has been silent on this point, until a reasonable time has elapsed.

FORM OR CONSIDERATION

The evidence required by law that the parties intended to enter into contractual relation is provided either by the signing, sealing, and delivery of a deed, or by the existence of consideration, i.e. some *quid pro quo*.

Because of the formality involved in executing a deed, the law is satisfied that the parties intended to be bound by their agreement. A deed (or specialty contract) is delivered by handing it to the other party or someone on his behalf, or by uttering words expressing an intention to make the deed operative as, for instance, "I deliver this as my act and deed." It is called an escrow if the delivery is made subject to a condition which must first be fulfilled before the deed becomes operative.

Fire insurance contracts are not usually made under seal because of the additional work involved in executing a deed. The normal fire insurance contract is, therefore, dependent for its validity upon the presence of consideration and, lacking the formalities of a deed, is called a simple or parol contract.

Consideration was defined in *Currie* v. *Misa* (1875), L.R. 10 Ex. 162, as "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." The giving of consideration by each party to the other is evidence that something more then a gratuitous and revocable promise was made. It is proof that a binding contract was intended. In return for the insurer's undertaking to indemnify the insured, the latter generally

pays a premium which is charged at a rate per cent on the sum insured. When the members of a mutual insurance association are liable to contribute to losses as they arise, however, the liability of each is the consideration for the right to an indemnity. Every consideration must be a present act or a present promise. A present act is called an executed consideration and a promise is called an executory consideration. The law takes no account of the adequacy of consideration, but it must be real and possess some value. It is not real if already the party from whom it passes is obliged to render it, either because of a public duty or by reason of a previous contract with the other party. In any action where the plaintiff alleges the existence of a contract, he must be able to show the giving of consideration to the defendant.

CAPACITY OF THE PARTIES

Limitations are placed upon the capacity of certain persons to contract; these will be considered only in relation to fire insurance.

Aliens. At common law, enemy aliens cannot enter into contracts with British subjects during war. Whether a person is an enemy depends upon the place where he voluntarily resides and not upon his nationality. Thus, a British subject may, by his voluntary residence in enemy territory, become an enemy. In time of war it is usual to supplement the common law with Trading with the Enemy legislation which makes it an offence to enter into contracts with enemies, and under this legislation the term "enemies" may apply even to persons whose residence is not in enemy territory.

Traitors and Felons. Persons convicted of treason or felony have no capacity to contract until they have served their sentence, been allowed out on licence, or received a pardon.

Lunatics. The management of the affairs of a lunatic, who is so found by inquisition, is vested in his "committee." A committee may make a binding contract on behalf of a lunatic. A lunatic not so found by inquisition usually has a receiver to attend to his affairs. If any insurance is necessary, the receiver will be permitted to charge the premium to the estate. A lunatic who himself enters into a contract is bound by it, unless it can be shown that he was wholly incapable of understanding what he was doing and the other party was aware of that fact.

Drunken Persons. A drunken person may also avoid a contract with a party who was aware of his inability to understand the nature of the act.

Corporations. Corporations created by Royal Charter are not restricted in their contractual capacity. If they exceed their express limitations, their actions will be binding, but their charter becomes liable to forfeiture. Corporations created by, or in pursuance of, a statute cannot enter into contracts which are inconsistent with, or not incidental to, the objects for which they were created. Such contracts are said to be *ultra vires*.

Infants. An infant i.e. a person under twenty-one years of age may enter into a contract of insurance provided, when considered as a whole, it is for his benefit. If it is not beneficial, he may avoid it and recover the consideration. Recovery is not possible, however, where he has received any benefit under the contract.

Married Women. Since the Law Reform (Married Women and Tortfeasors) Act, 1935, marriage does not affect the contractual capacity of a woman.

Insurers. By reason of the Assurance Companies Acts, 1909 to 1946, only certain persons or bodies may carry on the business of fire insurance in Great Britain. These enactments are explained in Chapter XI

REAL CONSENT

An agreement does not exist unless both parties have a common intention. The circumstances which throw doubt on the genuineness of an agreement are mistake, fraud, innocent misrepresentation, duress, and undue influence. Certain kinds of mistake render a fire insurance contract void; fraud, innocent misrepresentation (as later defined), duress, and undue influence make the contract voidable by the party aggrieved.

The only instances of mistake which do invalidate a contract are—

(*a*) mistake as to the nature of the contract, the mistake being due to the fraud of a third party,

(*b*) mistake as to the identity of the other party, where personal considerations are of the essence of the contract,

(*c*) mistake as to the intention of the other party, the mistake being known to that party,

(*d*) mistake by *both* parties as to the existence or identity of the subject-matter of the contract.

Mistake as to law gives no right to relief except where it is a mistake as to foreign law or as to a private right.

Fraud occurs when one party makes a statement of fact knowing it to be false, or without belief in its truth or recklessly, without caring whether it is true or false, provided, in each case, the party making the statement intended that it should deceive and be acted on and it is successful in inducing the other party to enter into the contract.

Innocent misrepresentation of a material fact which ought to be known to the party in fault gives the other party a right to avoid the policy. In addition, there are some special kinds of contract, of which fire insurance is one, in which each of the parties must not only not be guilty of misrepresentation of a material fact, but must also *disclose* all such facts to the other. These contracts are known as contracts of *uberrima fides*—the utmost good faith. This duty of the utmost good faith is discussed in Chapter V.

Duress is actual or threatened violence or imprisonment against the person of the contracting party or spouse, parent or child, with the object of inducing the contract by coercion.

Undue influence is the improper use of any power arising from the relative positions of the parties.

LEGALITY

If the subject-matter of a contract is illegal either at common law or by statute the contract will be void. Such circumstances seldom arise in connection with fire insurance. The insurance of a brothel has been held illegal.

POLICY

In order that a fire insurance contract may be valid, it is unnecessary to commit it to writing[1]; nevertheless, for the convenience of the parties—and because of the Stamp Act—the terms and conditions of the agreement are invariably expressed in a formal document known as a policy. Insurers do not all make use of the same form, but the members of the Fire Offices Committee utilize for most risks a standard wording which is printed in Appendix A.

A fire policy may be considered under the following headings: (1) Recital clause; (2) Operative or insuring clause; (3) Schedule; (4) Attestation; and (5) Conditions.

RECITAL CLAUSE

A full recital clause is one which sets out, by way of introduction to the insuring or operative clause, the names and addresses of the parties, the period of insurance and other details peculiar to the insurance in question. The modern practice is to relegate most of these particulars to a schedule to facilitate the typing of the document.

OPERATIVE OR INSURING CLAUSE

Then follows the operative clause which sets out the essence of the contract. The insurer agrees that if, after payment of the premium, the property insured is destroyed or damaged by one of the specified perils, within the initial period of insurance or any subsequent period for which the policy is renewed, he will pay to the insured the value of the property or the amount of the damage, or, at his option, reinstate or replace it.

The insurer's undertaking is subject to the conditions contained in, or endorsed on, the policy, which conditions, so far as the nature of them will respectively permit, are deemed to be conditions precedent to the right of the insured to recover. This reference to conditions is most desirable, for conditions appearing on the back of the policy, or attached thereto, do not form part of the contract unless specifically incorporated, or otherwise made part of the policy

[1] A memorandum in writing may be necessary if the contract is for more than a year. S. 4, Statute of Frauds, 1677.

by the intention of the parties. Clauses appearing in a separate document, or even the entire document itself, may be incorporated by a suitable reference.

By a proviso, it is made clear that the liability of the insurer shall in no case exceed, in respect of each item, the sum expressed in the schedule to be insured thereon, or in the whole, the total sum insured, or such other sum or sums as may be substituted therefor by memorandum.

SCHEDULE

The schedule is a frame within which a number of sections are provided for the details of the particular insurance, e.g. the name of the insured, the policy number, the agency, the period of insurance, the first premium, the annual premium, the description of the property insured and the sum insured.

DESCRIPTION

The description of the property may refer to a particular object or it may relate to a class, but, in either case, it must be sufficient to avoid doubt as to what is intended. If the subject-matter is a particular object, the insurance will not apply to any other object which later replaces the one that is specified. If, on the other hand, the subject-matter is a class described in general terms as, for example, "stock-in-trade," the insurance would be construed as applying not only to the goods held in stock at the inception of the insurance but to those that replace them in the ordinary course of trade. General terms will not, however, be loosely applied; fixtures will not be deemed to include furniture, nor will "stock-in-trade" include goods which are inappropriate to the insured's business.

Goods described as "held in trust" are goods with which the insured is entrusted. The existence of a trust in the strict sense of the word is not essential. A more restricted meaning is to be attached to the expression "goods held on commission": this relates to goods in insured's possession for sale. It is usual to restrict cover in respect of goods in trust or held on commission to those for which the insured is legally responsible.

The description in the policy is sufficient if it enables the subject-matter to be identified; it need not describe every detail. Generally, however, the locality is an essential part of the description and if the property is destroyed whilst at some other situation it will not be covered by the policy. If the property is moved away from the locality and later returned, it will again fall within the description and become the subject-matter of the insurance, provided the circumstances show that this was intended.

Where the description in the policy does not correspond with the property destroyed or where the description, when construed in the light of the circumstances, clearly does not apply to the property destroyed, the insurance will be inoperative in relation to the loss.

(*Watchorn* v. *Langford* (1813), 3 Camp., 422; *Joel* v. *Harvey* (1857), 5. W.R. 488.)

Even where the description does not prevent the subject-matter from being identified, it may, nevertheless, fall short of what is required of the insured by the duty *uberrimae fidei* to inform the insurer of the nature of the risk he is required to underwrite.

ATTESTATION OR SIGNATURE OF INSURER

The policy is signed on behalf of the insurer and the date of the contract is also inserted. Although the insured does not signify his concurrence by affixing his signature to the document he will, in the absence of any feature throwing doubt on the genuineness of the contract, be held to adopt it and to be bound thereby.

CONDITIONS

Usually on the back of the policy certain stipulations are printed under the heading: "Conditions." They deal with the duties of the parties and define their positions under the contract in certain circumstances. It must not be thought, however, that the clauses described as conditions are necessarily the only ones. Some conditions are implied in every policy unless the intention is clearly expressed to modify or exclude them. Moreover, conditions may appear on the face of the policy, or in some other document which is incorporated by reference.

The three main classes of conditions are—

1. Conditions precedent of the policy. These are conditions relating to matters which precede the inception of the contract and which must be fulfilled if the policy is to be valid. If there is failure to comply with such a condition, the contract is void *ab initio*.

2. Conditions subsequent of the policy. These conditions relate to matters subsequent to the inception of the contract and which must be fulfilled if the policy is to continue valid. A failure to comply with a condition subsequent avoids the contract as from the date of the breach, but without prejudice to any loss occurring before that date.

3. Conditions precedent to liability. These are conditions which relate to matters arising after a loss: they must be fulfilled before the insurer can be held liable for the destruction or damage. Failure to comply with such a condition does not affect the validity of the policy; the breach only affects the loss to which it relates.

IMPLIED CONDITIONS

The following conditions are said to be implied in every fire insurance contract, unless a contrary intention is expressed in the policy—

1. The subject-matter is in existence at the inception of the insurance. Doubt has been expressed by some authorities as to

the validity of this condition which would rule out insurances on future goods (*vide* page 18).

2. The insured has at the material time (vide page 18) an insurable interest in the subject-matter.

3. The utmost good faith is observed during the negotiations leading up to the contract, or to any later alteration in it.

4. The subject-matter is described so that it can clearly be identified.

EXPRESS CONDITIONS

When stipulations are stated in the policy or incorporated by reference, it is important that the contract should clearly indicate whether a failure to carry them out will invalidate the policy or exonerate the insurer from liability. The intention need not be conveyed by any special phraseology. The stipulation may be said to be the basis of the contract, or a warranty, or a condition precedent, but any other expression which shows that the requirement goes to the root of the contract will do just as well. In *Re Bradley and Essex and Suffolk Accident Indemnity Society*, [1912] 1 K.B. 415, C.A., the court criticized the practice of including in policies a general provision that all the conditions shall be deemed to be conditions precedent. It is for this reason that there now appears the qualification, "so far as the nature of them respectively will permit."

There are certain cases in which a stipulation, expressed to be a condition precedent, will not be so construed. Dealing with these instances Lord Watson said in *London Guarantee Co.* v. *Fearnley* (1880), 5 App. Cas. 911: "When the parties to a contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that stipulation ought, in my opinion, to receive effect, unless it shall appear either to be so capricious and unreasonable that a Court of Law ought not to enforce it, or to be *suâ naturâ* incapable of being made a condition precedent."

BREACH OF A CONDITION

A condition may be expressed in such general terms that it may be complied with in a number of ways. It may, on the other hand, be specific in its requirements, in which event the liability of the insurer depends upon exact compliance by the insured, irrespective of whether the condition is material, or of whether its observance is rendered impossible by circumstances over which the insured has no control. There is an exception where compliance with the condition is impossible *ab initio*: in this event the failure to comply does not invalidate the contract. (*Worsley* v. *Wood* (1796), 6 T.R., 710.) Unless otherwise stated, the breach of a condition affects the rights of all persons claiming through the insured, e.g. his legal personal representatives.

The burden rests upon the insurer of proving that the insured knew, or had the opportunity of knowing, the condition at the time that he should have complied with it. This will not be difficult to prove if the policy has been issued.

If he is aware of the facts, the insurer may waive the breach of a condition in writing, verbally, or by conduct. In the last-named event it is necessary that the conduct should not be consistent with a denial of liability, or with avoidance of the policy. Dispatching a claim form to the insured is not a waiver of a breach (*James* v. *Royal Insurance Co.* 1907), 10 N.Z. Gaz. L.R., 244), but taking possession of goods after a fire and so preventing the insured from complying with a condition was held to be a waiver of performance in *Smith* v. *Commercial Union Insurance Co.* (1872), 33 U.C. Q.B. 69. This does not, of course, mean that taking possession of the goods will be held to be an admission of liability.

STIPULATIONS WHICH ARE NOT CONDITIONS

Not every stipulation is a condition precedent or subsequent. If it does not go to the root of the contract, but is merely collateral to its main purpose, a failure to comply with the stipulation does not enable the insurer to avoid the contract nor to escape liability for a particular loss. He must carry out his undertaking to indemnify the insured and then claim damages for breach of the stipulation. An example of such a stipulation would be one relating to the payment of excess premium on adjustment under a declaration policy.

EXCEPTIONS

Under the heading "Conditions" are certain exceptions. By their nature, they cannot be construed as conditions precedent to the insured's right to recover under the policy: they exempt the insurer from liability for certain articles or for destruction or damage arising in certain circumstances.

STAMP DUTY

The stamp duty on a fire policy, i.e. every writing whereby any contract of fire insurance is made, or agreed to be made, or evidenced, is sixpence. (Finance Act, 1920, Sect. 40.) It may be paid at the Inland Revenue Office, where a stamp is impressed, or it may be denoted by an adhesive stamp which requires to be cancelled. Any alteration in the contract which was contemplated, or for which provision was made in the policy, does not attract additional duty.

An unstamped policy is not invalid, but it cannot be used as evidence in civil proceedings until it is stamped. Stamping a policy after execution will be undertaken on payment of the stamp duty and a penalty, which may be as much as ten pounds.

Moreover, a fine of twenty pounds is incurred by any person who (*a*) receives, or takes credit for, any premium or consideration

for any insurance, and does not, within one month afterwards, make out and execute a duly stamped policy; or

(*b*) makes, executes, or delivers out, or pays or allows in account, or agrees to pay or allow in account, any money upon or in respect of any fire policy which is not duly stamped. (Stamp Act, 1891, Sect. 100.)

Where it is impracticable or inexpedient to stamp individual policies, arrangements can be made for the stamp duty to be compounded. This would be a suitable method for coupon insurances.

CHAPTER II

CONSTRUCTION, RECTIFICATION, AND ALTERATION OF POLICY

CONSTRUCTION (OR INTERPRETATION)

In construing the meaning of a policy, effect must be given to the intention of the parties. This, however, is not a matter for speculation, but must be gathered from the words used by the parties to express that intention. The words must be understood in their ordinary sense unless, from the context, it can be shown that some different meaning was intended. Legal terms, however, must be given their legal meaning, unless a contrary intention is shown by the policy. It is not permissible to reject some of the words except where there is surplusage, or where their retention would lead to some absurdity, or would be repugnant to the intention of the parties as made clear in other parts of the document. Ordinary rules of grammar must be applied, but not so as to prevent the clear intention of the parties from prevailing. Errors of grammar may be corrected.

A word to which a specific meaning is attached in one part of the policy will, in the absence of anything to the contrary, be presumed to have the same meaning wherever it appears.

PRINTED POLICY

The fact that a printed policy form is used for many different types of risk must always be kept in mind. When a contradiction is discovered between the printed wording of a policy and the written wording used to adapt the common form to a particular case, the written wording must be preferred on the ground that it was drawn up to meet the special circumstances of that case.

If the written wording (which term includes type-written wording) is complete in itself, so as to make the printed wording inappropriate, the latter may be rejected. Such a case would, however, be exceptional, and in the typical instance the written and printed wording should be construed together as far as possible.

CONTRA PROFERENTEM

In many cases the policy is drafted by the insurer, without the assistance of the insured. The insurer has, therefore, every opportunity to express the intentions of the parties in a manner which provides no occasion for doubt or uncertainty. If he fails to make the meaning clear, it is necessary to apply the maxim *verba chartarum contra proferentem fortius accipiuntur* (the words of an instrument shall be taken more strongly against the party putting them forward). This means that the doubtful words will be

construed in the sense most favourable to the insured. On the other hand, in construing words supplied by the insured as, for example, where his broker drafts the schedule, the *contra proferentem* principle results in the insurer being given the benefit of any real doubt.

EJUSDEM GENERIS (OF THE SAME KIND)

In considering the meaning of any word, one must have regard to its context. When an enumeration of particular things of the same kind is followed by a general word, the latter will be construed according to the *ejusdem generis* rule and be held to connote only things of the same kind, unless additional words are used to render the rule inapplicable. Thus the words "and all perils, losses and misfortunes that have or shall come" when used in a marine policy at the end of an enumeration of perils of the same genus must be construed as if they were qualified by the insertion of the words "of like kind" after the word "misfortunes." If, however, the words used were "and all perils, losses, and misfortunes of what kind so ever" the intention of the parties would clearly be to give the words their widest possible meaning, and the *ejusdem generis* rule would not apply. It is the intention of the parties that must always prevail.

In an exception against insurrection, riots, civil commotion, or military or usurped power, the words "military or usurped power" refer to perils of an entirely different nature from those connoted by the preceding words and the *ejusdem generis* rule does not apply. (*Rogers* v. *Whittaker*, [1917] 1 K.B. 942.)

Sometimes the meaning of a general term is qualified by subsequent words which show that the parties attach a narrow significance to the general term. In *Joel* v. *Harvey* (1857), 5 W.R. 488, it was held that a policy effected on a corn dealer's "stock-in-trade, consisting of corn, seed, hay, straw, fixtures, and utensils in business" the expression "stock in trade" did not apply to hops or malting, its meaning being limited by the subsequent words.

AMBIGUITY

A contract which, on the face of it, is ambiguous, and which cannot be understood by applying the rules of construction, is said to suffer from the defect of patent (i.e. apparent) ambiguity, and it is void for uncertainty. If the parties do not make a comprehensible contract, the court will not undertake to make one for them. But where the meaning of an apparently clear contract may be questioned by reference to surrounding circumstances, it is permissible to produce evidence of extrinsic fact to resolve the latent (i.e. concealed) ambiguity. Evidence of custom or usage may be given to explain, but not to vary, a written contract.

TERMS INCORPORATED IN THE CONTRACT

The parties may state that certain terms shall be found elsewhere.

Indeed, an entire document may be incorporated in the contract and its terms then have the same operation as if they were inserted in the policy *verbatim*. An example of this is where a completed proposal is incorporated in a policy. Any particulars which are by agreement left to be determined after the drawing up of the policy are to be treated as part of it.

EXPRESS AND IMPLIED PROVISIONS

Express provisions override any implied provisions with which they are inconsistent. A provision that a policy shall be incontestable does not, however, override the implied condition that insurable interest must subsist.

RECTIFICATION

Where the insurers prepare the policy they must see that it properly expresses the terms of the contract. If it does not do so, the insured would be well advised to inform the insurers forthwith and have the wording corrected. There is no duty on the insured to do this, and a delay on his part in objecting to the policy as issued does not indicate acceptance. Nevertheless, the court would probably feel that an unreasonable delay justified the inference that he had agreed to the terms of the policy as issued. If he sues on the policy as it stands he will be deemed to have affirmed the contract. (*Newcastle Fire Insurance Co.* v. *Macmorran & Co.* (1815), 3 Dow, 255, H.L.) Therefore, should the insurers be unwilling to correct the policy, the insured must avoid suing on the policy and must ask the Chancery Division to make an order for its rectification, which the court will do, provided the existence of an agreement and the nature of its terms can be proved by reference to documents or by verbal evidence. Where, however, the evidence shows that the two parties were never in agreement, the court will order that the policy be set aside.

The happening of an event giving rise to a claim does not prevent the insured from asking for the policy to be rectified, but he has the alternative of basing his claim on the real agreement which the insurer has failed to embody in the policy.

The insurers, also, may ask the court to order rectification. This might be necessary where there is a wrong description of the insured or the subject-matter, or where the sum insured or the premium is incorrectly stated. Rectification would be ordered if there had been an unintentional departure from the agreed terms, but if the insurer had knowingly introduced into the policy a term on which agreement had not been reached, he would be deemed to have offered to vary the original contract.

RESCISSION

The court has power to declare that a contract is void *ab initio* where, for example, there has never been *consensus ad idem*. The

action may be brought by either the insurer or the insured and the order of the court is for the rescission of the policy. As an alternative to rescission, the aggrieved party may plead the same facts as a defence to an action on the policy. Thus an insurer may wait until a claim is made and repudiate liability on the grounds that the policy was void *ab initio*. For reasons that are explained in Chapter VIII, however, it is always better to deny liability under the policy because of the breach of a condition, than it is to repudiate the policy *ab initio*.

To avoid the possibility that important evidence may not be available when it is needed, one may bring an action to perpetuate testimony. It would then be available when required in a form acceptable to the court.

ALTERATION

A completed contract can be altered only by mutual consent.

If a policy is altered in a material particular whilst in the possession of the insured or his agent, it will be rendered void, unless the insured can prove that the insurer's consent was obtained. The alteration may be by the striking out or insertion of words, or by defacing the policy. If the purported alteration is in a separate document and the insured cannot prove the insurer's consent, the original contract, though not the alteration, will be valid.

When the parties agree upon an alteration, the insurer will endorse the policy or prepare a separate memorandum for attachment. The policy usually refers to the method by which an alteration shall be admitted by or on behalf of the insurer. It is essential that, as the policy itself is a written instrument, the alteration be made in writing.

A policy condition usually provides that the insurance shall be avoided in respect of any item which is affected by an increase in risk, unless the insurer has accepted the alteration and endorsed the policy accordingly. If the contract did not contain such a condition, an increase in risk which did not render the description of the subject-matter no longer applicable would not vitiate the insurance. (*Pim* v. *Reid* (1843), 6 M. & G. 1.)

CHAPTER III

INSURABLE INTEREST

NEED FOR INSURABLE INTEREST

THE fact that an insured may, in the event of a loss, receive a comparatively large amount in consideration of a small premium sometimes gives rise to the suggestion that insurance is analogous to gambling. The analogy is, however, only superficial. The pecuniary interest which the parties to a wager have in the uncertain event is normally created by the wager. Either party may win or lose. In contrast to this, the very essence of an insurance is that the insured shall, quite apart from the contract, have a pecuniary interest in the subject-matter and that, upon the happening of the event which is adverse to his interest, the payment to be made by the insurer shall merely indemnify him. Such a pecuniary interest is known as an insurable interest and an insured cannot claim under a fire insurance contract unless he is able to show that he has such an insurable interest in the subject-matter. (*Sadlers' Co.* v. *Badcock* (1743), 2 Atk. 554.) A contract of fire insurance not supported by such an insurable interest is held to be made by way of gaming or wagering and is void under the Gaming Act, 1845, Sect. 18.

Although an insurable interest must subsist, it is not necessary for the insured to disclose its nature unless it is so peculiar as to make it material or unless the insurer expressly requires its disclosure. In *Maurice* v. *Goldsborough Mort & Co.*, [1939] 3 All E. R. 63, it was decided that an insurance on goods does not cover prospective profits. Where it is desired to insure against loss of profits, the cover must be specifically requested, and a special policy wording used.

DEFINITION

A person has an insurable interest in a physical object when he stands in some legally recognized relation thereto, in consequence of which he may benefit by the safety, or be prejudiced by the loss, of the object.

It is this interest, not the physical object, which the insurance protects. Mere expectation that the necessary relation to the physical object will be acquired, though founded on the highest probability, is not an insurable interest. On the other hand, partial, defeasible and contingent interests are all insurable; hence the buyer of goods, who has the right to reject them, and the seller, who may have to take them back, may both insure.

LIFE ASSURANCE ACT, 1774 (GAMBLING ACT)

This Act, as the title indicates, was primarily intended to apply to life assurance, but its language is very wide and might possibly

be construed as applying also to fire insurance. It provides that "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming and wagering; and that every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.

"And be it further enacted, that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made or underwrote.

"And be it further enacted, that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

"Provided always, that nothing herein contained shall extend, or be construed to extend, to insurances bona fide made by any person or persons, on ships, goods or merchandise; but every insurance shall be as valid and effectual in the law as if this Act had not been made."

It will be noticed that the Act specifically excludes from its scope insurances made on goods or merchandise, and some authorities believe that it does not apply to fire insurance at all. In cases such as *Castellain* v. *Preston* (1883), 11 Q.B.D. 380. C.A., where the court has discussed the validity of policies issued to cover interests other than that of the insured, the question whether the names of the other interested persons appeared in the policies—as required by the Life Assurance Act, 1774—has never been treated as material: the determining factor has always been the intention of the insured. Again, the right of the insured, in the event of a claim, to recover on behalf of other interests which he intended to insure, is well recognized (*Waters* v. *Monarch Fire Assurance Co.* (1856), 5 E. & B., 870), notwithstanding the provision in the Act that no greater sum shall be received than the value of the insured's interest. It is worth mentioning, too, that the Act, in its application to life assurance, has been construed as requiring the interest to subsist at the time the policy is effected. In fire insurance cases, it has always been held that the interest must subsist at the time of the fire. The truth is that the purpose of the Act was to deal with an existing evil, namely the issue of life policies to persons without interest in the life assured; already it had been established that fire insurances could only protect an insurable interest.

WHEN THE INTEREST MUST SUBSIST

There is no doubt that the insurable interest must subsist at the time of the loss. Must it also subsist when the insurance is arranged? Those who argue that it must refer to the case of *Sadlers' Co.* v. *Badcock* (1743), 2 Atk. 555, in which it was said that "it is necessary the party insured should have an interest or property at the time of the insuring and at the time the fire happens." They also point out that if the Life Assurance Act, 1774, applies to fire insurances (other than in respect of goods and merchandise), the statute requires the interest to subsist at the time the policy is effected. By those who do not accept this point of view reference is made to the statement of Roche, J., in *Williams* v. *Baltic Insurance Association*, [1924] 2 K.B. 282: "there is no real support for the broad proposition that an interest must subsist at the time the policy is taken out; it was decided to the contrary as long ago as 1810 in *Rhind* v. *Wilkinson* (1810), 2 Taunt. 237, and the matter is discussed in *Phillips on Insurance*, 5th Edition, Sect. 179." This school of thought also rejects the Life Assurance Act, 1774, as irrelevant.

In practice, future interests are insured and provided the interest subsists when a claim arises, the policy will be treated as valid. Of course, if the insured, at the inception of the insurance, expressly represents that he has a subsisting insurable interest, it must attach at that time and not subsequently.

One case in which an interest does not appear to attach at the commencement of the insurance is where the cover is to apply to a class, e.g. stock-in-trade. The insured's interest in the particular articles which may be destroyed by fire will probably be acquired after the insurance has been effected. The true view is, however, that the insured's interest attaches to the subject-matter, i.e. the class, from the date of the contract, and the continual substitution of the items making up the class does not affect the position.

Provided the insured has an insurable interest in the goods at the time of their destruction it does not matter whether the insurance was arranged after the fire. In this event, however, the two parties must have been unaware of the loss and must have intended the insurance to apply to the property "burnt or not burnt"—a situation unlikely to arise in practice.

If an insured ceases to be interested in the subject-matter of his insurance, the policy ceases to cover it, and it is doubtful whether any interest which he may subsequently acquire revives the insurance. An insurance on goods of a class, e.g. stock-in-trade, will apply to goods sold and re-purchased. There is not, however, in this case any transfer of the subject-matter which is a class of unidentified items. A condition of the policy usually provides that the contract shall be avoided with respect to any item in regard to which there be any alteration after the commencement of the insurance whereby the insured's interest ceases, except by will or

operation of law, unless such alteration be admitted by memorandum signed by or on behalf of the insurer.

PERSONS WHO MAY INSURE

Obviously a person who is an absolute, though not necessarily a sole, owner of property has an insurable interest. A person with a partial interest, e.g. a partner, may insure for himself or for all interested: it is a question of fact as to what his intention was when the insurance was arranged.

Notwithstanding that an owner of property has entered into a contract to sell it, he still possesses an insurable interest, even after the conveyance, i.e. the legal transfer of the property, provided he is responsible for its safety, or has a lien as unpaid vendor. A lien is a right to retain property until certain legal demands are met.

A purchaser, too, has an insurable interest whether or not the property has been appropriated to the contract, or there has been a conveyance, or a liability has arisen to pay for it.

Trustees are legal owners of property, held on behalf of others, who are known as *cestuis que trustent.* A trustee is entitled to insure and may be required to do so by the trust instrument. Subject to any provisions in this document, a trustee has authority by Sect. 19 (1) of the Trustee Act, 1925, to insure all property comprising the trust estate (except property which he is bound to convey absolutely to any beneficiary on request) to an amount not exceeding three-fourths of its full value. The *cestui que trust,* on account of his interest as beneficial or equitable owner, is also entitled to insure.

Trustees in bankruptcy and bankrupts both have an insurable interest; the former in property which vests in them, the latter in property which they hold as apparent owners.

An executor or administrator of the estate of a deceased person is entitled, but not obliged, to insure the property. A beneficiary may also insure even before the personal representative has transferred the property to him.

Mortgagors, who borrow, and mortgagees, who lend, money on the security of property, both have an insurable interest in the property. The mortgagee may, in fact, charge fire insurance premiums upon the estate for sums insured not exceeding the amount specified in the mortgage deed or, if no amount is specified, two-thirds the cost of reinstatement. He cannot, however, charge the estate if the mortgage deed states that no insurance is required, or if the borrower is keeping up an insurance in accordance with the mortgage deed or with his consent. (Law of Property Act, 1925, Sect.101 and 108.) An express stipulation in the mortgage deed may override the statutory provisions.

Bailees, who have property entrusted to them, have an insurable interest in their commission, profit or lien, and also in their liability to the bailors for the safety of the property. Examples of bailees

are common carriers, pawnbrokers, factors, brokers, wharfingers, laundrymen, and garage proprietors.

An insurable interest may be shown to exist by anyone who has a liability in case of loss or who has lawful possession of the property. Thus a tenant may insure in respect of his liability under covenant to reinstate the property, and also in respect of his beneficial enjoyment of the premises. Shareholders have no interest in the assets of the company—nor have unsecured creditors in the assets of their debtors. (*Macaura* v. *Northern Assurance Co.*, [1925] A.C. 619.)

PERSONS WHO MUST INSURE

The incumbent of an ecclesiastical benefice of the Church of England must pay the fire insurance premium on the buildings, outbuildings and offices, to the Church Commissioners for England, who insure with a reputable office. (Ecclesiastical Dilapidations Measure, 1923.)

An Anglican church which formerly was insurable by the parishioners must be insured by the Parish Church Council. The practice is to insure in the joint names of the council and churchwardens since the latter are the legal owners. (Parochial Church Councils (Powers) Measure, 1921, Sect. 4.)

A bishop, dean, or canon may be directed by the Commissioners to insure his house of residence at his own expense. The Commissioners may indicate the sum to be insured and the company with which the insurance is to be placed. (Ecclesiastical Houses of Residence Act, 1842, Sect. 11.)

The person liable to make periodical payments of the charge imposed by the Improvement of Land Act, 1864, in respect of farm houses or buildings erected or improved under the Act must keep the property insured for a sum not less than the principal originally charged on the land. He must give an annual certificate as to the insurance to the Minister of Agriculture and Fisheries, in default of which the person entitled to the charge may insure and recover the premium with interest at 5 per cent per annum. Identical provisions are imposed in respect of mansion houses or appurtenances erected or improved under the Limited Owners' Residences Act, 1870.

A tenant for life, i.e. a person who is beneficially entitled under a settlement to the possession of settled land for his life, must keep insured at his own expense any building or work comprised in an improvement under the Settled Land Act, 1925, such insurance being for the sum prescribed by the Minister of Agriculture and Fisheries. Any interested person has a right of action against the tenant for life or his estate in case of default.

The owner of a small holding purchased from a county council under the Small Holdings and Allotments Act, 1926, must insure any building erected thereon.

A person may become obliged to insure property by entering into

a contract which includes such an undertaking. The duty may also be imposed on an individual by the terms of a will or settlement under which he claims an interest in an estate.

INSURANCE BY AGENT

Many cases have been quoted of two insurable interests concurrently subsisting in the same property, e.g. mortgagor and mortgagee, bailor and bailee. Although these interests are quite distinct, it often happens that a person having one interest decides to insure not only his own, but that of another party. Thus we find a bailee insuring the interests of himself and the bailor. There is no legal objection to this practice, even where the person arranging the insurance is not under an obligation to protect the other party's interest, and the other party is unaware of the insurance until after a loss has occurred. All the other party has to do is to ratify the action of the policy-holder who has acted as his agent. (*Waters* v. *Monarch Fire Assurance Co.* (1856), 5 E. & B. 870.) A policy issued to protect two separate interests is a composite, not a joint, policy and each interest should be treated as entirely distinct.

When a person who himself has no interest in the property, arranges an insurance on behalf of another, the action must be ratified before any loss arises for the insurance to be effective. (*Ferguson* v. *Aberdeen Parish Council*, [1916] S.C. 715.)

CHAPTER IV

INDEMNITY

SIGNIFICANCE OF INDEMNITY

IMPORTANT as it is that an insured shall have an insurable interest in the subject-matter, it is still more important that the amount recoverable in the case of loss shall be limited in accordance with the principle of indemnity. Were it not for this restriction, the insured might be tempted to take no care of his property or even to set it on fire.

DEFINITION

Indemnity implies the placing of a person, after a misfortune, in, as nearly as may be possible, the same pecuniary position as that in which he would have been had no misfortune arisen. In the case of *Castellain* v. *Preston* (1883), 11 Q.B.D. 386, Brett, L.J., said of indemnity: "that is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it—that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity—that proposition must certainly be wrong."

Nevertheless, there are practical reasons why a perfect indemnity may not be attained. A fire may cause not only loss of property, against which protection is afforded, but also loss of profit which is not covered by an ordinary fire policy. Of necessity the scope of the indemnity has to be defined and this results in limitation. Then, again, the insured may have fixed the sum insured at a figure below the value of the property and, in the event of a total loss, his claim would be limited, under any type of policy, to the sum insured at most. The policy may also be subject to average, which means that, should there be under-insurance, the insured must bear a proportion of every loss—though the whole sum insured is paid in the event of a total loss.

VALUED POLICIES

It should further be observed that in exceptional cases where the value of property is essentially a matter for an expert's opinion, the insurer may be prepared at the time of entering into the contract to undertake that an agreed value shall be payable in the event of a total loss. It was recognized in *Irving* v. *Manning* (1847), 1 H.L., Cas. 287, that under a valued policy the insured might conceivably obtain more than an indemnity, and such an insurance is not a perfect contract of indemnity.

Only where the agreed value has been fixed mistakenly, fraudulently, or so excessively as to make the contract one of gaming

and wagering, can the insurer dispute his liability to pay the sum insured for a total loss.

Sometimes the insurer agrees the values at the date of an expert valuation, but stipulates that, in the event of a loss, these amounts shall be subject to adjustment for appreciation or depreciation. This form of agreement more closely approximates to a perfect indemnity.

Generally it may be said that the agreed value has no bearing on the amount which may be claimed for a partial loss. The insured can recover the actual amount of the loss, not exceeding the sum insured. But if the loss is the total destruction of certain items, it may be that the valuation can be apportioned and the destroyed articles dealt with on agreed value bases.

It will be seen that there are many ways in which a policy may depart from a strict indemnity and it is essential, in applying the principle to a particular policy, to have regard to the wording chosen by the parties to express their intention.

INDEMNIFICATION ALIUNDE

If, before the insurer pays a claim, the loss is made good *aliunde* (from some other source) the insured cannot recover under his policy as he has already been indemnified and any further payment would infringe the principle of indemnity. It makes no difference whether the loss is made good voluntarily or by a person who has a legal liability to do so. If the indemnification *aliunde* is not complete, the insured can, however, claim the balance from the insurer.

SUBROGATION

After the insurer has fully indemnified the insured, any rights and remedies by which the loss might be mitigated or extinguished are to be exercised for the benefit of the insurer. This is the equitable doctrine of subrogation; it is a corollary to the principle of indemnity, for if the insured were allowed to exercise rights and remedies on his own behalf, he would receive more than the amount of his loss. Subrogation applies to a fire policy, even when no reference is made to it in the contract. It is usual, however, for a condition of the policy to provide that the insurer may require the rights and remedies to be exercised *before* instead of after indemnification. It is sometimes advantageous for an insurer to be able to insist upon steps being taken before a claim has been paid, and this would not be possible in the absence of an appropriate condition.

If the amount paid by the insurer in settlement of a claim is less than a full indemnity, because of under-insurance, the rights and remedies are first to be exercised to enable the insured to have his loss made good. (*Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333.) Thereafter they are to be applied in diminishing the insurer's loss. If the right arises out of the ownership of salvage which the insurer has agreed to accept, it may be enforced in his name; otherwise,

in the absence of a formal assignment under Sect. 136 of the Law of Property Act, 1925 (*vide* page 36), it must generally be enforced in the insured's name. An exception is where the right is conferred by statute as, for instance, Sect. 4 (1) of the Riot (Damages) Act, 1886. In those cases where the insurer cannot commence an action in his own name, he can enlist the aid of the court to compel the insured to proceed, subject to an indemnity to cover legal costs.

When an attempt is made to enforce subrogated rights, the person sued cannot resist liability on the ground that the insurer has paid the insured for a loss in respect of which the insurer was not liable, provided he acted in good faith.

Where the insured has been fully indemnified, the insurer is not required to account to him for any amount by which the sum recovered by the exercise of subrogated rights exceeds the payment made under the policy.

Examples of circumstances in which the right of subrogation often arises are given below—

(1) where the insurer has paid the insured's loss and there is salvage;

(2) where the loss was caused by the tort of some person other than the insured; and

(3) where the loss was one for which some person other than the insured, e.g. a bailee, is responsible under contract.

In case (1) the insurer's title in the salvage will relate back to the date of the fire. The insurer will be entitled in case (2) to the benefit of the damages recovered from the tortfeasor and, in case (3), to the benefit of the damages recovered under the contract. He must, however, pay any legal costs incurred in enforcing the remedies.

The insurer cannot usually object to the insured taking action himself against third parties. (*Globe and Rutgers Fire Insurance Co.* v. *Truedell* (1927), 60 O.L.R. 227.) If the insured has recovered under his policy only a partial indemnity, he must not proceed against a third party for the uninsured balance only, but must claim both for himself and on behalf of the insurer. (*Commercial Union Assurance Co.* v. *Lister* (1874), L.R. 9 Ch. 483.) The insurer's rights under the doctrine of subrogation must not be prejudiced by any act of the insured such as releasing the third persons from liability. (*Phoenix Assurance Co.* v. *Spooner*, [1905] 2 K.B. 753.) If the insured has been fully indemnified and he proceeds against a third party, he will be required to pass to the insurer the amount recovered.

CONTRIBUTION

Although the insured may, in the absence of any policy condition to the contrary, claim from one insurer for the full indemnity afforded by his policy, that insurer would be entitled in equity to seek contribution in his own name from any other insurer.

The equitable right of contribution applies even where the policies are not identical provided that—

(1) They are intended for the benefit of the same interest whether named or not. No question of contribution arises where the policies cover different interests in the property, e.g. bailor and bailee. The insurer of the bailor may have a right against the bailee, but this would be by reason of the doctrine of subrogation, and the right would not be to a contribution, but to an indemnity. (*North British & Mercantile Insurance Co.* v. *Liverpool and London Globe Insurance Co.* (1877), 5 Ch.D. 569.)

(2) The whole or some portion of the property destroyed is within the scope of all policies. Obviously the right of contribution can only apply to that common portion.

(3) They both cover the peril which has caused the loss.

(4) They are in force and valid when the loss occurs.

(5) They do not contain conditions which have the effect of restricting the application of contribution.

It is usual, however, for the policy to contain a contribution condition which states *inter alia*—

"If at the time of any destruction of, or damage to, any property hereby insured, there shall be any other insurance effected by, or on behalf of, the insured, covering any of the property destroyed or damaged, the liability of the insurer hereunder shall be limited to its rateable proportion of such destruction or damage."

Where there has been double insurance, this clause restricts the insurer's liability in the first place to his rateable proportion and thus prevents him from having to pay the whole of the loss, and also from having to collect contributions from other insurers.

The application of this clause is further considered on page 49.

Although the principle of indemnity prohibits one interest from receiving more than a full indemnity, it does not prevent two distinct interests from being paid amounts which together exceed the amount of the destruction or damage. This situation can arise where the two interests are respectively first and second mortgagees as in *Scottish Amicable Heritable Securities Association, Ltd.* v. *Northern Assurance Co.* (1883), 11 R. (Court of Session) 287, and *Glasgow Provident Investment Society* v. *Westminster Fire Office* (1887), 14. R. (Court of Session) 947.

CHAPTER V

THE UTMOST GOOD FAITH

DEFINITION

THE principle of the utmost good faith (*uberrima fides*) forbids either party to an insurance contract, by non-disclosure or misrepresentation of a material fact, which he knows or ought to know, to draw the other into the bargain, from his ignorance of that fact and his believing the contrary. (*Carter* v. *Boehm* (1766), 3 Burr, 1909.)

The duty of the utmost good faith is implied in insurance contracts because they are entered into by parties who have not the same access to relevant information. In this, they differ from contracts of sale to which the maxim *caveat emptor* (let the buyer beware) applies.

Although the duty rests upon both parties, it is the duty of the proposer which needs to be discussed in some detail for he usually has the advantage of knowing most of the particulars relating to the subject-matter. Until a definite offer to enter into an insurance contract has been unconditionally accepted the duty of the utmost good faith must be strictly observed. The obligation arises again prior to each renewal and, to a limited extent, when the insured desires an alteration in the policy. In the latter case, he must inform the insurer of any facts material to the alteration. Apart from these occasions, the parties must act honestly, but this should be distinguished from the duty of the utmost good faith.

MATERIAL FACTS

A material fact is one which would have influenced the judgment of a prudent insurer in deciding whether he would accept the risk in whole or in part and, if so, at what amount of premium. The materiality of a fact depends upon the application of this test to the particular circumstances of the case as at the date that the fact should have been communicated. Material facts may have a bearing on the physical hazard or on the moral hazard, or they may show that if a loss occurs the insurer's liability is likely to be greater than would normally be expected. Any facts which point to a greater likelihood of fire than might normally be expected are material. (*Bufe* v. *Turner* (1815), 6 Taunt. 338.) In *Re Yager and Guardian Assurance Co.* (1912), 108, L.T. 38, it was held that the fact that previous insurers had refused to continue a policy was material in fire insurance. An inquiry as to any point shows what the insurer regards as material, but is not conclusive proof that it is so. On the other hand, the restricted scope of a question may be construed as a waiver by the insurer of the right to receive fuller information,

but the absence of a question relating to a fact which is material does not relieve the proposer from the duty of disclosing it.

FACTS WHICH NEED NOT BE DISCLOSED

Unless inquiry is made, it is not necessary to disclose the following facts—

(*a*) Any fact which diminishes the risk.

(*b*) Any fact which is known or which, by law, may be presumed to be known to the insurer—the insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer, in the ordinary course of his business, ought to know.

(*c*) Any fact as to which information is waived by the insurer.

(*d*) Any fact as to which he is given sufficient information to put him on inquiry.

(*e*) Any fact which it is superfluous to disclose by reason of an express or implied condition.

EFFECT OF NON-DISCLOSURE

Where there has been non-disclosure, whether innocent or fraudulent—sometimes called concealment—the contract is voidable at the option of the insurer. This is the position where the matter is not dealt with by a policy condition. The ground is usually covered by a policy condition which may do no more than state the common law rule.

REPRESENTATIONS

Representations are statements made during the negotiations with the object of inducing the other party to enter into the contract: they must be distinguished from statements which are introduced into the contract, and upon the truth of which the validity of the contract is made to depend.

Representations may be as to a matter of fact, and, if material, must be substantially correct. They may, however, be as to a matter of belief or expectation, in which event the belief or expectation need not be realized, provided the representations were made in good faith.

Where there has been misrepresentation it is necessary to decide whether it was fraudulent or innocent.

A fraudulent misrepresentation is one which was known to be false; or which was made without belief in its truth, or recklessly, careless whether it was true or false. Fraudulent misrepresentation of a material fact entitles the insurer to avoid the policy.

The case of innocent misrepresentation is not quite so simple. By the Marine Insurance Act, 1906, Sect. 20, every material representation must be true, or otherwise the insurer may avoid the contract. This marine rule, it seems, cannot be applied to fire insurance.

(*Stokes* v. *Cox* (1856), 1 H. & N. 533.) Every material fact which the insured ought to know in the ordinary course of business must be stated; an innocent misrepresentation of such a fact would entitle the insurer to avoid the policy. This must be so, otherwise the duty to disclose material facts and to state them accurately would not be correlative.

It is sometimes argued on the basis of decisions not arising out of fire insurance law that all innocent misrepresentations entitle the insurer to apply for rescission of the contract, provided he does not delay after discovery of the inaccuracy. The matter is of academic interest only, since policies usually contain a condition which enables the insurer to avoid the contract in the event of any misrepresentation or misdescription of a material particular, the right to avoid under the condition being exercisable at any time, irrespective of delay.

PROPOSAL FORM

In order to obtain most of the information necessary to consider the merits of a risk, the insurer arranges for a report by a surveyor in connection with all but the simplest cases. For small risks, e.g. house, shop, and farm insurances, the prospective insured may be required to answer questions on a printed proposal form. In the absence of any stipulation as to the effect of inaccuracy or incompleteness, a failure to complete the form properly must be considered in the light of the foregoing paragraphs, according to whether there has been non-disclosure, or innocent or fraudulent misrepresentation. There is non-disclosure where the proposer leaves a question unanswered and thereby fails to bring material information to the notice of the insurer. (*Taylor* v. *Yorkshire Insurance Co.*, [1913] 2 I.R.1.) An answer which is true as far as it goes, but by reason of its incompleteness gives a false impression, is a misrepresentation. At the same time, the questions must be given a reasonable construction and the proposer given the benefit of any ambiguity in the wording. Where, for instance, a question is asked as to the existence of other insurance, it will be understood as referring only to the property to be insured. Generally, an answer which is inconsistent and obviously a mistake will place the onus on the insurer of making further inquiry.

Answers must be substantially correct; an immaterial misstatement will not avoid the policy. A literally true answer will not be sufficient if it is misleading. In *Holt's Motors* v. *South East Lancashire Insurance Co.* (1930), 35 Com. Cas. 281, C.A., the insured had not intended to apply for renewal of a previous insurance, though he knew that the insurer would not have been willing to renew. It was held that, in his reply to the question whether the insurer had refused to renew, there should have been a disclosure of the fact that the insurer would not have agreed to renew. On the other hand the accuracy or completeness of answers to questions

will always be considered in the light of other particulars already known to the insurer.

WARRANTIES

It may be stated in the policy that the truth of a particular fact is warranted. Warranties, unlike representations, do not depend upon materiality. Whether material or not, facts which have been warranted must be strictly true, otherwise the insurer may avoid liability under the policy from the date that the warranty has been broken. "It is," said Lord Eldon in *Newcastle Fire Insurance Co.* v. *Macmorran* (1815), 3 Dow H.L. 262, "a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore, the materiality or immateriality signifies nothing. The only question is as to the mere fact."

The facts warranted may be stated in the policy itself or in another document which is incorporated in the policy by reference, and whenever it can be shown that the intention of the parties was to make the proposer's representations as to the truth of certain facts a condition precedent to the insurer's obligation, either by reference to the policy or to some document incorporated therein, those facts are not simply representations; they amount to warranties. Thus, the prospective insured may be required to sign a declaration at the end of the proposal form agreeing that the accuracy of the answers shall be a condition precedent to the validity of the policy, and the proposal may then be incorporated in the contract. The inclusion of a statement of fact in the contract does not necessarily make it a warranty (*Thomson* v. *Weems* (1884), 9 App. Cas. 684), and the effect of the statement will depend upon the circumstances of the case.

This use of the word "warranty" is at variance with the terminology applied to other mercantile contracts; a warranty in any but an insurance contract is an undertaking which is collateral to the main purpose of the contract and the breach of which gives rise to a claim for damages. (Sect. 62 (1), Sale of Goods Act, 1893.)

CONTINUING WARRANTIES

A warranty which affirms or negatives a particular fact needs to be drafted with care, otherwise it may be construed as applying to that fact only at the commencement of the insurance and not throughout its duration.

By a condition in the usual form of policy, however, it is provided that every warranty shall, from the time it first attaches, apply and continue to be in force during the whole currency of the policy, and non-compliance with any such warranty, whether it increases the risk or not, shall be a bar to any claim in respect of the item to

which it applies. Nevertheless, it is provided that where the policy is renewed, a claim in respect of destruction or damage occurring during the renewal period shall not be barred by reason of a warranty not having been complied with at any time before the commencement of that period.

CHAPTER VI

DURATION OF CONTRACT—ASSIGNMENT—RETURN OF PREMIUM

COVER NOTE

IT may take some little time for the insurer to decide whether the proposal is acceptable, but as immediate cover may be required, the position is met by the insurer or his authorized agent issuing a cover note which expresses an undertaking to insure the property provisionally. If the insurer desires that the insured shall be bound by the terms and conditions of the usual policy, it is essential that they should be incorporated, for the cover note is really a separate short term contract which may, or may not, be replaced by a policy. The precise moment when the interim cover terminates depends upon the wording used. If the proposal is accepted, it is usual to ante-date the policy so as to include the period to which the cover note related. The contract, as expressed in the cover note, then becomes merged in the policy, and if the latter is issued duly stamped within one month of receiving or taking credit for the premium, the cover note need not be stamped.

INITIAL PERIOD

The distinction between the date when the parties enter into the contract and the date when the first period of insurance commences should be borne in mind. As already stated, the contract comes into existence at the moment that one party communicates to the other, or his agent, his *unqualified* acceptance of the other's offer and at that moment the duty of disclosure ceases. The insurer's liability under the policy may not arise until a specified future date. Where cover is arranged subject to the stipulation that it shall not come into force until the premium is paid, the insurer is not bound until the premium has been paid, in the absence of conduct creating an estoppel of denial of liability on the grounds of non-payment. Thus, under the standard fire policy, the insurer's liability does not arise until the premium has been paid. Subject to this requirement, the initial period of insurance is as stated in the schedule. In construing the period specified in the policy, effect must be given to the intention of the parties, and it would not be safe to lay down any hard and fast rule. In *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Assoc.*, [1891] 1 Q.B. 402, C.A., the day named as the one from which the period was to run was held not to be included, but in *Scottish Metropolitan Assurance Co.* v. *Stewart* (1923), 39 T.L.R. 407, it was decided that the dates named as the ones on which the period began and ended were inclusive. The last day will terminate at midnight unless an earlier time, e.g. four o'clock in the afternoon, is specified. (*Isaac*

v. *Royal Insurance Co.* (1870), L.R. 5 Ex. 296.) Fire policies may be for any period, but they are usually yearly contracts.

RENEWAL

Towards the end of each period of insurance, the insurer, if he is content that the insurance should be renewed, sends a renewal notice to the insured, although there is no obligation to do so. This is really an offer to enter, for a further period, into a contract, subject to the terms and conditions of the policy. It is sometimes argued that the initial, and all subsequent, renewal periods constitute one continuing contract. This would obviously be true if the parties were contractually bound to renew: usually, however, neither the insurer nor the insured has a right to insist upon renewal and there is a fresh offer and acceptance. Accordingly the duty of good faith arises again, and if new material facts have come into existence since the duty of disclosure was last performed, it is incumbent upon the insured to make a full disclosure. (*Law Accident Insurance Society, Ltd.* v. *Boyd and another*, [1942] S.L.T. 207.)

In practice, the insured, if he intends to renew the policy, is generally allowed fifteen days of grace after the renewal date during which to pay the premium. Where such a concession is granted by a clear statement in the renewal notice, the insurer would doubtless be held to have waived any provision in the policy that his liability for the renewal period should not commence until the premium had first been paid. Nevertheless, the insurer could not be compelled to accept the premium if the insured had previously given evidence of his intention not to renew. (*Salvin* v. *James* (1805), 6 East, 571), nor if the payment were not made within the days of grace. (*Simpson* v. *Accidental Death Insurance Co.* (1857), 2 C.B. (N.S.) 257.)

DETERMINATION

Unless the policy includes a cancellation clause enabling one of the parties to determine the insurance by giving notice to the other of his intention so to do, the insurance can only be terminated prior to the expiry date by—

(*a*) Mutual agreement, (*b*) settling a total loss or paying the sum insured, (*c*) breach of a condition which avoids the policy or which renders the policy voidable at the option of the insurer and the option is exercised, (*d*) winding up of the insurance company or, (*e*) supervening illegality.

There would be mutual agreement if the parties decided to replace an existing insurance by a contract in different terms.

Paying the total sum insured terminates the insurance because it is expressly stated in the policy that the insurer's liability shall not exceed the total sum insured. An exception is, however, provided by the Riot (Damages) Act, 1886, for, under Sect. 2 (2), the insurance is to remain in force if the insurer, after paying the total

sum insured, obtains reimbursement out of the police rate. Further consideration is given to the provisions of this statute on page 58.

As an example of a condition the breach of which may bring the insurance to an end, condition 2 of the standard policy may be quoted. "This policy shall be avoided with respect to any item thereof in regard to which there be any alteration after the commencement of this insurance (1) by removal, or (2) whereby the risk of destruction or damage is increased, or (3) whereby the insured's interest ceases except by will or operation of law, unless such alteration be admitted by memorandum signed by or on behalf of the company" (i.e. the insurer).

When an insurance company goes into liquidation, its policies are determined and the policy holders can claim such portion of the last premium paid as is proportionate to the unexpired portion of the period.

It is illegal to discharge obligations to a policy holder who has become an enemy, without special licence being obtained. Authorities are not agreed as to whether policies are suspended or completely determined when the insured acquire enemy status. It is usual for these matters to be dealt with by appropriate clauses in the peace treaties.

ASSIGNMENT

Three forms of assignment call for discussion; assignment of the subject-matter, assignment of the policy and assignment of the proceeds of the policy.

First there are the transfers of the subject-matter which result from a will or the operation of law. When the insured dies, the subject-matter passes to his legal personal representatives either by reason of a will or, where no will has been made, by operation of the law of intestate succession. In the case of an intestacy, the policy, as well as the subject-matter, passes to the personal representative, who may, so long as he holds the property, claim for the benefit of the estate in respect of any fire loss. Where there is a will, it has been argued that the disposition of the property is determined by the act of the insured which would be in breach of an absolute condition against assignment. Any doubt on this point is removed, however, by the wording of the condition in the standard fire policy which expressly permits of alienation of interest by will or operation of law. When the insured is adjudged bankrupt, the subject-matter, as well as the policy, passes by operation of law to the trustee in bankruptcy. Personal representatives and trustees in bankruptcy must comply with the policy conditions, and if any breach has occurred prior to their becoming interested, they will have no better rights than the original insured would have had.

A voluntary assignment by the insured of the subject-matter of the policy may bring about a cessation of his insurable interest, in which event the insurance will be of no value to him, nor will

it protect the assignee unless the insurer agrees to insure him. Cessation of the insured's interest also occurs where the subject-matter is sold and conveyed, and two cases require separate treatment: the sale of buildings and the sale of goods.

SALE OF BUILDINGS

The sale of buildings is effected in two stages: a contract to buy (which may be informal) and conveyance (which is effected by deed), with an intervening period for investigation of title. Failing any arrangement to the contrary, the contracting purchaser becomes responsible for the safety of the building as from the time of entering into the contract to buy. Nevertheless if a fire occurs before conveyance the insured vendor is entitled to claim under his policy, because the purchaser might conceivably fail to complete the conveyance and pay the purchase price. Assuming, however, that the conveyance is subsequently effected and the price paid, the insured would then be required to reimburse the insurer in accordance with the doctrine of subrogation. (*Castellain* v. *Preston* (1883), 11 Q.B.D. 386.) This common law position is modified, to some extent, by statute: Sect. 47 of the Law of Property Act, 1925, provides that when a fire takes place between the date of the contract and completion, the purchaser is entitled to the proceeds of the policy subject to (1) any stipulation to the contrary in the contract, (2) the payment by the purchaser of a proper proportion of the premium, and (3) the consent of the insurer. This consent may be printed as a memorandum on the standard policy in the following words—

"If at the time of destruction or damage to any building hereby insured the insured shall have contracted to sell his interest in such building and the purchase shall not have been but shall be thereafter completed, the purchaser on the completion of the purchase, if and so far as the property is not otherwise insured by or on behalf of the purchaser against such destruction or damage, shall be entitled to the benefit of this policy so far as it relates to such destruction or damage without prejudice to the rights and liabilities of the insured or the company (i.e. the insurer) under this policy up to the date of completion."

Once the property has been conveyed and the vendor has given up possession, he loses his insurable interest, even though the purchase price is still unpaid. If, however, he retains possession, he will have a lien until the purchase price is paid, and will still have an insurable interest by virtue of this lien as unpaid vendor.

SALE OF GOODS

The transfer of the property in goods from the vendor to the purchaser is effected without the necessity of a deed. The property passes when the parties intend it to pass, but if the intention is not clear, the rules set out in Sect. 18 of the Sale of Goods Act, 1893, are to be applied. These are as follows—

"Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval, or 'on sale or return' or other similar terms, the property therein passes to the buyer—

(*a*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

(*b*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5. (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer, with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property is transferred the goods are at the buyer's risk whether delivery has been made or not. Should delivery be delayed through the fault of either the buyer or seller, however, the goods are at the risk of the party in fault, as regards any loss which might not have occurred but for such fault. In no circumstances can the buyer claim the benefit of the seller's insurance unless the insurer has agreed to the change of interest.

If the price has not been paid, and the goods remain in the vendor's hands, he has a lien over them for the amount of the debt

and may insure by virtue of his lien. If he parts with possession, however, he loses his lien and his insurable interest ceases.

If the contract provides that it is cancelled in the event of fire, the insurable interest of the vendor continues until the possibility of such cancelment is ended.

ASSIGNMENT OF POLICY

A fire policy can only be assigned with the consent of the insurer for it is a personal one between him and the insured. (*Rayner* v. *Preston* (1881), 18 Ch.D. 1.) An assignment should take place contemporaneously with the transfer of the insured's interest in the subject-matter; for if it is assigned before the assignee has an interest, the insured will not be protected and the assignee will not be able to claim for any loss, whilst if the insured defers the assignment until some time after he has disposed of the subject-matter, the policy will already have become void for lack of insurable interest. (*Lynch* v. *Dalzell* (1729), 4 Bro. P.C. 431.) The effect of a valid assignment of the policy is to place the assignee in the place of the insured, with all his rights and duties under the contract. If the policy has been invalidated by some act of the insured, the assignee will suffer accordingly. Where, however, the circumstances are such as to point to a new contract having been effected between the insurer and the purchaser of the subject-matter, and not to an assignment of the old policy, no act or omission of the original insured will prejudice the new insurer.

ASSIGNMENT OF PROCEEDS

The right to receive the proceeds from a policy, as distinct from the policy itself, may be assigned. This is so even where the contract prohibits the assignment of the policy. The assignee is not required to have an insurable interest in the subject-matter, nor is the insurer's consent necessary. All that he acquires is the right to receive any money which may be payable to the insured, who still remains liable to perform all his obligations under the contract and who may, therefore, by act or omission, give the insurer grounds for repudiation of liability. Where the requirements of the Law of Property Act, 1925, Sect. 136, relating to choses in action can be met, and the proceeds are assigned absolutely in writing by the insured and written notice is given to the insurer, the assignee can sue the insurer in his own name; in other cases the assignment is equitable only and any action must be brought in the name of the insured.

RETURN OF PREMIUM

Subject to any express terms in the policy relating to the return of premium, the insured can generally claim a return of premium where there has been a failure of consideration. Instances are as follows—

(*a*) Where the insurer has been guilty of a lack of good faith or has been guilty of fraud.

(*b*) Where the insured has innocently failed to disclose material facts, or has innocently misrepresented such facts, and the insurer treats the policy as void *ab initio*.

(*c*) Where a particular subject-matter (not being a class of objects) has been insured for more than could ever be recovered in *any* circumstances and the insured has acted honestly. If the over-insurance arose from various policies effected on the same date, the return of premium would be made rateably by all insurers. If policies were effected at various dates, the return would be on the later policy or policies creating the over-insurance.

(*d*) Where, by reason of mutual mistake, the policy has never been valid.

(*e*) Where the insurers, being a company, enter into liquidation: the portion of the premium returnable is that corresponding to the unexpired period of the risk.

The insured is not entitled to a return of premium if the risk has once attached, unless the premium can be apportioned between different risks and some have never attached. He cannot claim a return if he has been guilty of fraud, nor if the contract is illegal unless he rescinds it before it has begun to operate, or it can be shown that he was misled by the insurers into believing that it was legal.

The Law Reform (Frustrated Contracts) Act, 1943, which provides for the adjustment of the rights and liabilities of parties to a frustrated contract, specifically excludes any contract of insurance.

CHAPTER VII

LOSS BY FIRE

FIRE

THE meaning of the word "fire" for purposes of a policy may be limited by the contract, and the wording chosen by the parties must always be considered in order to ascertain their intentions.

Fire occurs only when there is ignition: spontaneous fermentation or heating without ignition is not a fire. The policy wording, however, usually excludes fire due to spontaneous fermentation or heating of the property actually destroyed or damaged, although it covers any such fire which spreads to any other insured property. Similarly, it expressly excludes the destruction of, or damage to, property by fire caused by its undergoing any process involving the application of heat.

Fire must, from the insured's point of view, be fortuitous and accidental. It may be the wilful act of some other person, provided it is without the consent or connivance of the insured. It may even be due to the negligence of the insured himself provided there is no fraud.

"Damage caused by excess of fire heat in an ordinary grate is not damage by fire within the policy," said Scrutton, L.J., in *Upjohn* v. *Hitchens*, [1918] 2 K.B. 51. But a claim is tenable if property accidentally falls or is thrown into the grate and is destroyed by fire. Admissible also is the destruction of property which has been hidden in a grate to escape the notice of thieves and which subsequently is set on fire by the owner who has forgotten its whereabouts. "I think the true test is whether or not there has been an ignition of the insured property which was not intended to be ignited. If there has been, the loss is one caused by fire," said Atkinson, J., in *Harris* v. *Poland*, [1941] 1 All E.R. 212.

PROXIMATE CAUSE

This judicial pronouncement must not be interpreted as meaning that the property insured must in every case be ignited. It is sufficient if some property becomes accidentally ignited and if the destruction or damage to the insured property be proximately caused thereby as, for example, by smoke from the fire. The test to be applied in all cases is: Was the destruction or damage to the insured property directly and effectively caused by a fire within the meaning of the policy? Fire need not be the last event immediately preceding the destruction or damage. It may be separated from the destruction or damage by a chain of events, provided the fire continues as the real and effective cause throughout the chain. Fire ceases to be the proximate cause, however, if some new cause

intervenes, making fire merely a remote cause. The new cause might be neglect on the part of the insured.

The rule that insurers shall only be concerned with destruction or damage which is proximately caused by fire is sometimes very difficult to apply to a given set of circumstances. It is obvious that if fire to an insured building causes the walls to fall, the rule applies. But what is the position if the walls of the insured building are weakened by a fire in adjoining premises and subsequently fall? The damage would be proximately caused by fire if the fall occurred within a reasonable time afterwards and without the intervention of any other cause. But if the fall occurred because the insured failed to take reasonable steps to support the wall, the insured's neglect would be regarded as an intervening cause.

Any damage resulting from a necessary and bona fide effort to put out a fire, whether by drenching goods with water or by throwing articles of furniture out of the window, comes within the rule. The blowing up of property by the fire brigade with the object of checking the spread of fire is to be treated as destruction by fire. In *Stanley* v. *Western Insurance Co.* (1868), L.R. 3 Ex. 71, Kelly, C.B., held that the exclusion of explosion which is usually to be found in a fire policy would not apply in such circumstances. Sect. 12 of the Metropolitan Fire Brigade Act, 1865, now repealed, specifically provided that any damage occasioned by the brigade in the due execution of their duties should be deemed to be damage by fire within the meaning of any policy against fire.

Damage to goods which occurs during the inevitable confusion caused by a fire would also be within the rule and in *McGibbon* v. *Queen Insurance Co.* (1866), 10 L.C.J. 227, the insurers were held liable even for loss due to theft of goods. It has been questioned however, whether theft would be held to be covered under the present form of policy, which applies only to destruction or damage.

A fire policy usually covers destruction or damage proximately caused by other perils, e.g. lightning, and explosion (i) of boilers used for domestic purposes only, and (ii) in a building, not being part of any gas works, of gas used for domestic purposes or used for lighting or heating the building. In *In re an Arbitration between the Mayor, Aldermen and Burgesses of the Borough of Willesden and Municipal Mutual Insurance, Ltd.* (1945), 199 L.T. 115, it was decided that the heating of a building by a boiler is a domestic use, and it does not cease to be a domestic use merely because a business is carried on, on the premises.

EXCEPTED PERILS

Although fire is the main peril against which indemnity is afforded, it is not every fire which falls within the scope of the contract. As previously stated, fire due to "spontaneous fermentation or heating of the property damaged or to its undergoing any process involving the application of heat" is specifically excluded by the

printed policy. So, too, is fire occasioned by or happening through "earthquake, subterranean fire, riot, civil commotion, war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power." Some of these terms have received judicial interpretation.

"Riot" was defined by Phillimore, J., in *Field* v. *Receiver for Metropolitan Police*, [1907] 2 K.B. 853. He stated that there were "five necessary elements of a riot: first, number of persons, three at least: secondly, common purpose; thirdly, execution or inception of the common purpose; fourthly, an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; and fifthly, force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage."

"Civil commotion" was discussed in *London and Manchester Plate Glass Co.* v. *Heath*, [1913] 3 K.B. 411 C.A. Approval was expressed of Lord Mansfield's definition, which was "an insurrection of the people for general purposes, though not amounting to a rebellion where there is usurped power." "Commotion connotes turbulence or tumult and, I think, violence or intention to commit violence," said Buckley, L.J., in the same case. Confirmation for this view that there must be turbulence is to be found in *Levy* v. *Assicurazioni Generali*, [1940] 3 All E.R. 427, in which it was decided that an organized conspiracy to commit criminal acts did not amount to commotion.

"War" does not appear to have a precise technical meaning. With regard to the use of the word in a charter party, Greene, M.R., said in *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S.Co., Ltd.* (*No.* 2), [1939] 2 K.B. 544. C.A., "I am unable to accept the suggestion that there is any technical meaning of the word 'war' for the purpose of the construction of this clause. . . . If there is such a technical meaning, I do not know where it is to be found." Professor Westlake defines "war" as "the state or condition of governments contending by force."

"Act of foreign enemy" can only be committed by one who is an enemy of the state of which the insured is a member. (*Butler* v. *Wildman* (1820), 3 B. & Ald. 402.)

"Hostilities" are hostile acts committed by agents of an enemy government or of an organized rebellion. The acts of private individuals working independently are not hostilities. (*Atlantic Mutual Insurance Co.* v. *King*, [1919] 1 K.B. 310.)

In "civil war" the acts of force must have a public purpose such as the overthrow of the government, or the frightening of either House of Parliament into doing what they would not otherwise have done.

"Insurrection" means a rising of the people in open resistance against established authority with the object of supplanting it.

(*Lindsay and Pirie* v. *General Accident Fire and Life Assurance Corporation*, [1914] S.A.R. (A.D.) 574.)

"Military or usurped power" is an expression which was considered in *Drinkwater* v. *London Assurance Co.* (1767), 2 Wils. 363, and *Curtis & Sons* v. *Matthews*, [1919] 1 K.B. 425 C.A. It means something in the nature of war or civil war in which the participants, whether forces of the Crown, rebels, or enemies, are organized.

EXCEPTED PERILS AND PROXIMATE CAUSE

Just as an insurer is liable only for destruction or damage which is proximately caused by the kind of fire falling within the scope of the policy, so he is not liable for losses which are proximately caused by excepted perils. Where, in the natural course of events, an excepted fire spreads and causes destruction or damage to various premises, all the effects of the fire will be excluded from fire insurance cover. (*Tootal Broadhurst Lee Co.* v. *London and Lancashire Fire Insurance Co.* (1908), *Welford & Otter-Barry*, 3rd Ed., p. 498. On the other hand, where the excepted fire spreads by the intervention of a new cause which cannot be said to be the natural consequence of the excepted fire, the destruction and damage rightly attributable to the new cause will not fall within the exception.

EXCLUSION OF EXPLOSION

A fire policy usually includes fire (whether resulting from explosion or otherwise) except as stated in the operative clause. The provisions of the standard fire policy have the effect of making the insurers liable for destruction or damage caused by fire due to concussion irrespective of the cause of the explosion, and of relieving them from liability for destruction or damage due to concussion, even though the cause of the explosion be fire. Liability is accepted for explosion of boilers used for domestic purposes only, and for explosion in a building not being part of any gas works of gas used for domestic purposes or for lighting or heating the building (see page 39).

If the policy contained an unqualified exclusion of explosion, the application of the rule of proximate cause would mean that a fire caused by an explosion would be an excepted fire, and an explosion, whether caused by a fire or not, would be outside the scope of the policy. (*Re Hooley Hill Rubber and Chemical Co. and Royal Insurance Co.*, [1920] 1. K.B. 257 C.A; *Stanley* v. *Western Insurance Co.* (1868), L.R. 3 Ex. 71.)

There remains for consideration—although it rarely arises in practice—the policy which merely covers fire and is silent as to the effect of explosions: the application of the rule of proximate cause brings about the following results.

1. If an explosion caused a fire, the destruction or damage resulting from the fire would clearly be within the policy.

2. If an explosion were caused by a fire (within the meaning of

the policy) on the same premises as the subject-matter, the destruction or damage resulting from the explosion would be within the policy.

3. If an explosion were caused by a fire not on the same premises as the subject-matter, any destruction resulting solely from concussion would not be considered as proximately caused by fire and would not be within the policy. (*Taunton* v. *Royal Insurance Co.* (1864), 2 Hem. & M. 135.)

ONUS OF PROOF

Generally it is for the insured to prove that the destruction of, or damage to, the subject-matter was occasioned by fire. This does not mean that the proof must be conclusive. It need do no more than establish a prima facie case. The insurer then has an opportunity of producing evidence to show that the loss is excluded by the policy wording and if this appears to be established it rests, in turn, with the insured to prove, if he can, that the exception does not apply to the particular loss, either in whole or in part. There are two instances where the burden of proof does not follow these rules. One is where the contract specifically provides who shall have this responsibility; the other is where an exception is not expressed as a subtraction from the insured peril, but is to be inferred from the very words used to describe the insured peril, which are chosen so as to relate only to what is covered. In the latter case, since the insured must prove that his loss was occasioned by the restricted peril he is, in effect, burdened with the responsibility of showing that it was not caused by what is excluded.

CONSEQUENTIAL LOSS

Even when a fire within the meaning of the policy has occurred, an ordinary fire policy does not indemnify the insured against all adverse consequences. Usually the contract is worded to make it abundantly clear that the insurer's obligation is to pay the value of the subject-matter at the time of its destruction, or the amount of the damage or, at his option, to reinstate or replace such property or part thereof. Other consequences, such as loss of anticipated profit, the obligation to continue certain payments, e.g. rent and wages, although production has ceased, and the incurring of additional expenditure to start up business again, do not come within the policy. But even if the policy did not make this clear, these consequences would be deemed to be only remotely, and not proximately, caused by fire. It is essential, therefore, to mention them specifically in any insurance contract which is intended to provide for them. Such a contract is known as a Loss of Profits insurance.

CHAPTER VIII

CLAIMS PROCEDURE

DUTIES OF INSURED AND INSURER

WHEN a fire occurs the insured is not entitled to adopt the attitude that as he is covered, the extent of the damage does not concern him. In accordance with the duty of good faith, he must do what he can to prevent or minimize the loss, and this positive duty exists irrespective of any policy conditions. Similarly he has a negative duty not to interfere with the fire brigade and not to hinder salvaging operations. Wilful failure to carry out either duty is a ground on which the insurer may repudiate liability not merely for the amount by which the loss is aggravated, but for the entire loss. (*Devlin* v. *Queen Insurance Co.* (1882), 46 Can. Q.B. 611.)

The insurer, on the other hand, is entitled to enter the premises in order to prevent or minimize the loss, and to protect the salvage for a reasonable time. The policy usually gives the insurer wider powers than those granted in all cases by the Common Law. The standard policy provides that on the happening of any destruction or damage in respect of which a claim is, or may be, made under the policy, the insurer and every authorized person may, without thereby incurring any liability and without diminishing the insurer's right to rely upon any conditions, take possession of, or require to be delivered to them, any property insured, and may keep possession of and deal with such property for all reasonable purposes and in any reasonable manner. If the insured or anyone acting on his behalf does not comply with the insurer's requirements, or hinders or obstructs the insurer, then all benefit under the policy is forfeited.

ABANDONMENT

The condition also stipulates that the insured shall not in any case be entitled to abandon any property to the insurer, whether the latter has taken possession of it or not. In order to understand the full significance of this condition, one must refer to marine insurance law, which recognizes not only an actual total loss, but also a constructive total loss. The latter occurs when the subject-matter is reasonably abandoned on account of its actual total loss appearing unavoidable or because it could not be preserved from actual total loss without an expenditure which would exceed its value when salved. Where the assured intends to claim for a constructive total loss, he gives notice of abandonment to the insurer as soon as possible. Fire insurance law does not recognize a constructive total loss and consequently there is no such thing as a notice of abandonment. But where the insured is fully insured and has been

paid a total loss he is not also entitled to any salvage there may be. "Whenever, therefore, there is a contract of indemnity and a claim under it for an absolute indemnity there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity," said Brett, L.J., in *Kaltenbach* v. *Mackenzie* (1878), 3 C.P.D. 467. From the insurer's point of view the ownership of salvage may be more of a liability than an asset and, for this reason, the contract makes it quite clear that the insured shall not be entitled to abandon the property to the insurer.

NOTICE AND EVIDENCE OF CLAIM

An insured whose interest has suffered by reason of destruction of, or damage to, the subject-matter should give notice, within a reasonable time, to the insurers, in order that the loss may be investigated and checked. He need not proceed to press his claim at once, apart from any policy condition to the contrary, for the Limitation Act, 1939, does not bar an action on a simple contract until six years after the right of action has accrued.

It is customary, however, for the insurer's requirements as to notice and evidence of claim to be made a condition precedent to his liability. The standard policy states that, on the happening of any destruction or damage, the insured shall forthwith give notice to the insurer. It is a question of fact whether this condition has been complied with in any case.

The condition goes on to say that the insured shall within thirty days after such destruction or damage, or such further time as the insurer may in writing allow, at his own expense deliver to the insurer a claim in writing containing as particular an account as may be reasonably practicable of the several articles or portions of property destroyed or damaged and of the amount of destruction or damage thereto respectively, having regard to their value at the time of the destruction or damage, together with details of any other insurances on any property insured under the policy. To assist the insured in formulating his claim, the insurer usually supplies him with a claim form which he is required to complete. Issuing the claim form is not tantamount to an admission of liabilty, nor is it to be interpreted as the waiver of any breach of a condition. The insured will be excused from compliance with the condition if the insurer, by keeping possession of the salvage, renders impossible the preparation of the necessary particulars.

The condition also places upon the insured the obligation to furnish the insurer with all such proofs and information with respect to the claim as may reasonably be required together with, if demanded, a statutory declaration of the truth of the claim and any matters connected therewith.

It may happen that, by endeavouring to comply with this condition promptly, an insured under-estimates the amount of his

loss or inadvertently omits an item from the claim form. In such a case, he is permitted to amend or supplement the particulars prior to a settlement being reached.

FRAUDULENT CLAIMS

The common law which requires a proposer to disclose all material facts prior to the conclusion of the contract, also requires an insured to deal honestly with the insurer when a claim arises. (*Britton* v. *Royal Insurance Co.* (1866); 4 F. & F., 905.) It is customary, however, to include in the policy a condition which provides that, if a claim be in any respect fraudulent, or if any fraudulent means or devices be used by the insured or anyone acting on his behalf to obtain any benefit under the policy, or if any destruction or damage be occasioned by the wilful act or with the connivance of the insured all benefit under the policy shall be forfeited. To place very high estimates on the values of destroyed goods is not necessarily fraudulent.

MEASURE OF INDEMNITY

If an insured under a valued policy sustains a total loss, he can, in the absence of fraud or mistake, claim the sum insured. For a partial loss, however, he must claim the actual amount of the damage sustained, subject to the sum insured not being exceeded.

Under the standard policy, which does not provide for an agreed value, the undertaking of the insurer is to pay the value of the property at the time of the happening of its destruction, or the amount of such damage or, at his option, to reinstate or replace such property or part thereof. His liability must not, however, exceed in respect of each item, the sum expressed to be insured thereon, or in the aggregate, the total sum insured. This general undertaking may be qualified by some clause, e.g. a condition of average. It may also be modified by the fact that the insured has only a limited interest in the property.

Even if the policy did not state that the value of the property was to be determined as at the time of the happening of its destruction, that is the sense in which the policy would be construed. Similarly it is the value at the place of the fire that concerns the insurer. This is sometimes an important consideration, for the value may vary according to the situation.

Value in most cases means market value, for if the insured can purchase goods similar to those destroyed with the money paid by the insurer, he is indemnified. There are cases, however, where this value cannot be regarded as satisfactory, and where the cost of repairs with an allowance for depreciation, or the effecting of a replacement would be a suitable basis for settlement. It is the intrinsic value which is the guiding factor: the sentimental value is never taken into account.

BUILDINGS

If the insured is under a legal obligation to reinstate the building, or if he requires the building on the site where the original one stood, it is obvious that the insurer should pay the cost of reinstatement, taking into account the enhanced value as a result of reinstatement. Where physical deterioration exists prior to the destruction or damage by the insured peril, a deduction should be made, otherwise, by obtaining new for old, the insured would be given more than an indemnity. The cost of reinstatement does not include the cost of improvements, even although they may improve the fire hazard for the future. Reinstatement means putting the property in the *same* condition as immediately before the fire.

MACHINERY

Where the machinery can be repaired, the cost of the work would be an appropriate measure of the insured's loss. Where, however, the repairs include a certain amount of replacement of damaged parts, or the machinery has to be replaced completely, the insured is entitled to the cost less an allowance on account of the wear and tear on the old machinery. The insurer, on the other hand, is entitled to take credit for the value of the salvage.

STOCK-IN-TRADE

To indemnify an insured, he must be restored to the position he was in immediately before the fire.

On the merchanting side, both wholesale and retail stock-in-trade is acquired at a certain price to be sold at a higher. If a trader loses some of his stock by fire, he can normally be indemnified by paying the replacement cost price of the stock at the date of the fire, plus the cost of carriage and other normal charges incurred to replace the goods at the same situation. The insurer is entitled to any value remaining in the salvage and if an allowance is not made for it in the settlement, it may be taken over by the insurer. It is sometimes argued that the trader should be paid the profit which he would have made had the goods been sold, but this view is untenable where a replacement can be effected at cost price and normal charges.

The position of a manufacturer requires separate consideration. His stock might represent the result of many months' work and if, for a total loss, he were paid only the cost of raw materials, carriage, and labour, he might argue that he had not been fully indemnified. In *Equitable Fire Insurance Co.* v. *Quinn* (1861), 11 L. Can. Rep. 170, the stock-in-trade consisted of blocks which belonged to a block-maker. It was contended for the insurers that the insured was entitled only to such a sum as would enable him to manufacture fresh blocks, but the court decided that he should be paid what they were worth in the market at the time of the fire. This decision should be applied with caution: a profit

is not earned until after goods are sold and indemnity demands no more than that the insured's position should be restored.

When dealing with farming produce, it must be borne in mind that, on the happening of a fire, the cost of processing, e.g. threshing, may be saved and, therefore, the price which the farmer would have received for the sale of the processed produce requires to be adjusted on account of any expenditure which is avoided. If he is obliged to replace the produce for consumption on the farm, the cost will include carriage.

HOUSEHOLD GOODS, FURNITURE, FIXTURES, AND FITTINGS

The value is clearly the cost of replacing them at the time and place of fire, after allowing for any wear and tear and for salvage retained by the insured. Nowadays goods, which have been in use for some years, may be worth as much as, or even more than, they were when new.

REINSTATEMENT

A policy which simply stated that the insurer would indemnify the insured would be construed as expressing an undertaking to pay money, and money only. Neither the insurer nor the insured could insist upon a reinstatement of the property instead of a money payment. It is customary, however, for a fire policy to give the insurer the option to reinstate the property, and the insured must accept the method of performing the contract which the insurer decides to adopt. The insurer may by conduct waive his right.

The insurer is not obliged to notify the insured in writing that he has decided to reinstate. On the other hand inquiries made to ascertain the extent of the loss cannot be construed as the exercise of this option, for it is obvious that certain information must be obtained before any decision can reasonably be made. Once the option to reinstate has been exercised, he cannot retract from the position he has taken up. In the absence of any policy condition to the contrary, the property must be reinstated substantially as before, and it is no excuse to show that the work will cost more than the sum insured or even that the reinstatement has become impracticable through extraneous causes; the insurer's failure may make him liable to pay damages. The standard policy provides, however, that the insurer shall not be bound to reinstate exactly or completely, but only as circumstances permit and in reasonably sufficient manner, and shall not in any case be bound to expend in respect of any one of the items insured more than the sum insured thereon. It also provides that, where the insurer elects or becomes bound to reinstate or replace any property, the insured shall, at his own expense, produce and give to the insurer all such plans, documents, books and information as may reasonably be required.

MORTGAGED PROPERTY

Sect. 108 (3) of the Law of Property Act, 1925, provides that all money received on an insurance of mortgaged property against loss or damage by fire or otherwise, effected under the Act or any enactment replaced by the Act, or on an insurance for the maintenance of which the mortgagor is liable under the mortgage deed, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

Sub-section (4) further states that, without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on any such insurance of mortgaged property be applied in or towards the discharge of the mortgage money.

It will be appreciated that these obligations rest upon the mortgagor and not upon the insurer.

FIRES PREVENTION (METROPOLIS) ACT, 1774

This Act, which applies only to houses and other buildings, provides that, in certain circumstances, the insurers shall cause the insurance money to be expended, so far as it will go, in rebuilding, reinstating, or repairing the premises.

Insurers have this duty where—

(1) there is reason to suspect that the insured, or any person acting on his behalf, or in collusion with him, has been guilty of fraud or has wilfully set fire to the property, or

(2) they are requested so to do by any person interested in, or entitled to, the property as, for example, owners, purchasers, lessors, lessees, tenants for life and remaindermen, tenants from year to year, mortgagors, and mortgagees.

The statute applies only where the insured would have a valid claim against the insurers. If the insurers can deny liability to the insured on whatever ground, they cannot be required to comply with the terms of the Act.

The right to have the property reinstated only exists prior to the adjustment of the claim.

A request for reinstatement need not be in writing, but it should contain a reference to the statute. Should the insurers fail to comply with the request, the person claiming under the Act may obtain an injunction to restrain them from paying the money to the insured.

The insurers if liable must proceed with reinstatement unless the insured, within sixty days after the adjustment of the loss, gives sufficient security that he will expend the money in reinstatement.

In *Sinnott* v. *Bowden*, [1912] 2 Ch. 414, it was held that the Act, in its reinstatement provisions, applied to the whole of England, but the validity of this construction has been doubted on more than one occasion.

ECCLESIASTICAL PROPERTY

Under the Ecclesiastical Dilapidations Measure, 1923, any insurance money payable under a policy effected by the Central Authority, viz. the Church Commissioners for England, must be used in reinstating the property.

Similarly under the Ecclesiastical Houses of Residence Act, 1842, the Commissioners may direct that insurance money payable in respect of the destruction of the house of residence of a bishop, dean or canon shall be deposited in trust and applied in reinstating the building.

LOSS APPORTIONMENTS

By the terms of the contribution clause, the insurer's liabilty is limited where there is any other insurer, to his rateable proportion, but it is not usually stipulated whether the basis on which the proportion is to be calculated is the sums insured or the respective liabilities under the different policies. One might have expected that the question would often have been before the courts in relation to different types of fire insurances; in fact, however, various rules of practice have come to be adopted by insurers, and the methods of contribution have seldom been considered judicially. It may, however, be suggested that no method would be approved by a court which deprived the insured of any part of his indemnity, unless such method were specifically authorised by the terms of the policy.

EX GRATIA PAYMENTS

Insurers sometimes pay claims for which they are not liable, or in respect of which their liability is doubtful. Where the insurer is a company, its directors are entitled to make ex gratia payments, since they have a publicity value, and the expense may be likened to expenditure on advertising (*Taunton* v. *Royal Insurance Co.* (1864), 2 H. & M., 135.) Such payments do not place an insurer under an obligation to meet similar claims should the same circumstances arise again.

SUCCESSIVE LOSSES

An insurer is responsible to meet successive losses occurring within the same period of insurance, but the amount available is only the balance after deducting from the sum insured the previous losses. Where, however, he has elected to reinstate property, he is, in the absence of any provision to the contrary, liable for any loss due to a fire occurring during reinstatement, and his liability is not reduced by the amount already spent on reinstatement.

ENFORCEMENT OF THE CONTRACT: ARBITRATION

The normal method of enforcing a contract is an action at law. It is possible, however, for the dispute to be submitted to the more informal, often less costly, and private process of arbitration, and this may be brought about by the agreement of the parties.

The law relating to arbitration is to be found in the Arbitration Acts 1889 and 1934, and a submission is deemed to include the provisions set forth in the First Schedule to the Act of 1889, as amended by the Act of 1934, so far as they are applicable to the reference.

Most fire policies contain a clause providing for the submission of disputes to arbitration, and the standard fire policy contains an arbitration clause which is a submission by the parties of "all differences arising out of the contract to the decision of an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two arbitrators, one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties, or in case the arbitrators do not agree, of an umpire appointed in writing by the arbitrators before entering upon the reference." Although this appears in the policy which is signed only by the insurer, it is nevertheless the submission of both parties and is irrevocable.

An award on a submission may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect. A sum directed to be paid by an award carries interest as in the case of a judgment debt, unless the award orders otherwise.

The arbitration clause in the standard fire policy states that the making of an award shall be a condition precedent to any right of action against the insurer. If, notwithstanding this stipulation, the insured commences an action without obtaining an award the insurer may either plead the clause as a complete defence to the action or, waiving the condition precedent, apply for a stay of proceedings until the difference has been submitted to arbitration and an award has been made. The court is empowered to stay the proceedings by Sect. 4 of the Arbitration Act, 1889. It provides that if any party to a submission commences proceedings against any other party to the submission, any party to the proceedings may, at any time after appearance and before delivering any pleadings or taking any other step in the proceedings, apply to the court to stay the proceedings, and that the court, if satisfied that there is no sufficient reason why the matter should not be referred to arbitration and that the applicant was, at the time the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make the order staying the proceedings. "Appearance," as used in this section, means acknowledging, in the formal manner, the jurisdiction of the court on being served with a writ.

By reason of the Limitation Act, 1939, an action on a simple contract cannot be brought after six years have elapsed from the date on which the cause of action accrued. To prevent undue delay, however, the arbitration clause stipulates that after the expiration of one year after any destruction or damage the insurer shall not be liable in respect of any claim therefor unless such claim shall, in the meantime, have been referred to arbitration.

This provision is subject to Sect. 16 (6) of the Arbitration Act, 1934, which states that—

"where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the foregoing provisions of this section, extend the time for such period as it thinks proper."

The question sometimes arises as to the scope of an arbitration clause and in *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337, the House of Lords considered the effect of a clause which began: "If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred for arbitration. . . " It was held that where the dispute is whether the contract has ever been entered into at all or was void *ab initio*, the arbitration clause (being part of an ineffective document) cannot operate. If, however, the parties accept the contract as having been entered into, but differ as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, these are differences which would fall within the scope of the arbitration clause. It is better, therefore, to base a denial of liability on the breach of a condition.

If the insurer repudiated the contract on the grounds of fraud, it would seem that he could not insist upon the validity of the arbitration clause, but if, alternatively, he repudiated liability under the contract because of the breach of a condition in circumstances that were clearly fraudulent, he would be entitled to treat the arbitration clause as a valid submission. It is provided by Sect. 14 of the Arbitration Act, 1934, however, that where there is an agreement to refer disputes, and a dispute arises as to whether one of the parties has been guilty of fraud, the court may order that the agreement shall cease to have effect and revoke any submission made thereunder.

If no other mode of reference is provided, the reference is to a single arbitrator, but if the reference is to two arbitrators, they must appoint an umpire immediately they are appointed. If, on notice being given to nominate an arbitrator there is a failure to do so, the applicant may then proceed to appoint an arbitrator.

The court may remove an arbitrator or umpire who fails to use reasonable dispatch and an arbitrator or umpire so removed is not entitled to remuneration. Where an arbitrator or umpire has misconducted himself, the court may remove him, and in such circumstances, or where an arbitration or award has been improperly procured or is uncertain, the court may set the award aside.

An award may, by leave of the court, be enforced in the same manner as a judgment and specific performance may be granted.

The costs of the reference and award are in the discretion of the arbitrators or umpire.

An arbitrator or umpire may, and shall if so directed by the court, state any question of law arising in the course of the reference, or an award or part of an award, in the form of a special case for the decision of the court.

An appeal from an award may be made within six weeks after publication, and the matter may be remitted to the arbitrator for reconsideration (1) where additional evidence has been discovered, (2) where the award is bad on the face of it, (3) where there has been an admitted mistake of law or fact and (4) where the arbitrator has misconducted himself.

CHAPTER IX

LIABILITY FOR FIRE DAMAGE

LEGAL responsibilty to make good destruction or damage due to fire may arise out of a contract, or by reason of a tort, or by virtue of the Riot (Damages) Act, 1886. The responsible party is not exonerated by showing that the claimant is being indemnified by his insurers. If the indemnity is complete the insurers will be subrogated to the rights of the insured, and will be entitled to the payment made by the person responsible.

LIABILITY ARISING OUT OF CONTRACT

The simplest case is where a contract expressly or impliedly imposes a liability upon the third party to pay for any loss. Examples of contracts which may impose such a liability are those made between (*a*) landlord and tenant, (*b*) vendor and purchaser, (*c*) mortgagor and mortgagee and (*d*) bailor and bailee.

LANDLORD AND TENANT

In the exceptional cases where the lease does not deal with the liability for repairing the premises, the tenant is not responsible for an accidental fire: neither can the landlord be compelled to repair or rebuild them.

It is usual, however, for the matter to be dealt with in the lease. The tenant, for instance, may enter into a covenant to repair, and this obligation does not exclude repairs consequent upon an inevitable accident, e.g. an unavoidable fire. Complementary to the obligation to repair is the usual covenant that the tenant will insure the demised premises to their full value, and will keep them insured during the term. As this is an arrangement to ensure that the tenant will have sufficient money to meet the covenant to repair, it is frequently provided that the landlord's approval must be obtained to the proposed insurer. In such a case, the landlord has an absolute right to withhold his consent and need not give his reasons. (*Tredegar* v. *Harwood*, [1929] A.C. 72.) It may be provided, too, that all moneys received by virtue of the insurance shall forthwith be laid out in rebuilding and reinstating the premises, and any deficiency be made good by the tenant.

The tenant's liability to pay rent during the period of the lease is not determined by the destruction of, or damage to, the premises by fire. A covenant could be included in the lease to give the tenant relief, but such a provision is not usual.

VENDOR AND PURCHASER

It has already been explained that once a purchaser has entered into a contract to acquire buildings, he is obliged to pay the purchase

price, even although the property is destroyed by fire prior to the conveyance. This is subject to the qualification that if the vendor causes the destruction by failing to exercise reasonable care whilst the buildings are in his possession, he will be held legally responsible therefor. A discussion of the position of vendor and purchaser will be found on page 34.

MORTGAGOR AND MORTGAGEE

The destruction of the property which is security for a mortgage does not relieve the mortgagor of his obligation to repay the loan. Usually he is required by the mortgage deed to keep the property insured, or to bear the cost of insurance and, in these circumstances, the mortgagee has a statutory right to insist upon any insurance moneys being applied towards the discharge of the mortgage. The statutory right is explained on page 48.

BAILOR AND BAILEE

Generally it may be said that a bailee is not responsible for loss of, or damage to, the property of the bailor, unless it is due to the bailee's negligence, or unless he disobeys instructions and fails to carry out his contract. By the express terms of the agreement between them, however, the bailee may accept liability for any loss or damage or, on the other hand, he may escape responsibility even for negligence. Bailees adopt various methods of contracting out of their responsibilty for negligence: they may exhibit a notice for all to see, or they may print a condition on the receipt handed to the bailor for the articles entrusted to them. In all cases they must show that, when the contract was entered into, the bailor had his attention drawn to, or was aware of, the existence of the condition. If the contract is of such a nature as to require the bailee to undertake work on the property himself, he will not, in the event of unauthorized delegation, be able to claim the benefit of the condition. The disclaimer protects him only whilst he acts within the terms of the contract.

Special considerations affect the following cases—

(*a*) Innkeepers are responsible at common law for the safety of their guests' property, but they are not liable for losses when due to act of God, King's enemies, or the guest's negligence, or the guest took upon himself the obligation of protecting his own property. In the event of a loss, the innkeeper's liability is, by virtue of Sect. 1 of the Innkeepers Act, 1863, limited to £30 except—

(i) where the innkeeper has failed to exhibit, in a prominent place in the hall or entrance of the inn, a copy of Sect. 1 of the Act, or

(ii) where the loss is due to the wilful act, default or neglect of the innkeeper or his employee, or

(iii) where the property has been deposited with the innkeeper for safe custody, or

(iv) where the property is a live animal, carriage (which includes a motor car), harness or other appurtenance.

(*b*) Common carriers are those who hold themselves out to carry anybody's goods for a money payment. They are liable at common law for the safety of goods whilst in their custody as common carriers (*Chapman* v. *Great Western Railway Co.* (1880), 5 Q.B.D. 278), but are not responsible for any loss caused by act of God, King's enemies, inherent vice of the goods or the neglect of the consignor. Under the Carriers Act, 1830, carriers by land cannot escape their liability by posting notices repudiating liability. The consignor's attention must be drawn to the notice and a special contract concluded. Even then the carrier is not relieved from responsibility for the felonious acts of his employees. Certain provisions in the Act apply only to valuables such as jewellery, precious stones, china and pictures exceeding £10 in value in any one parcel. The carrier must exhibit a list of the increased charges for such goods and, if the consignor does not declare their nature or refuses to pay the extra charge, the carrier is relieved of his responsibility. The £10 limit was, in the case of railway companies, made £25 by the Railways Act, 1921. The Railway Executive is subject to the same provisions.

(*c*) Pawnbrokers are, by Sect. 27 of the Pawnbrokers Act, 1872, made liable, in the event of destruction by fire of the property pledged, for its value less the amount of the loan and profit, such value to be the amount of the loan and profit and 25 per cent on the amount of the loan. The claim must be made within a year and seven days from the date of pledging.

(*d*) Wharfingers can be held responsible for damage or destruction by accidental fire when it can be shown that a usage to this effect exists in the trade.

Where it becomes impossible to perform a contract because of the destruction of an object, the continued existence of which was obviously the basis of the contract, both parties, if free from blame for the damage, are discharged from further performance. (*Taylor* v. *Caldwell* (1862), 3 B. & S. 826.)

LIABILITY BY REASON OF A TORT

Tortious liability arises from the breach of a duty primarily fixed by law towards persons generally, and its breach is redressable by an action for unliquidated damages.

Where destruction or damage is caused to another's property intentionally, the tort committed is trespass. The person responsible for the loss may also be prosecuted for a criminal offence.

Most fire losses are not, however, caused intentionally, but many are due to negligence or nuisance. Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs,

would do, or the doing of something which a prudent and reasonable man would not do. The negligence may be in causing the fire or in allowing it to escape and spread. A person is liable not only for his own negligence but also for that of his servants, acting within the scope of their employment. Normally there is no vicarious liability for the acts and omissions of independent contractors, but in *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48, it was decided that the principal was responsible for the negligence of independent contractors engaged on work involving the use of fire. When fire is brought on to premises, the standard of reasonable precautions is exceedingly high.

"Nuisance and negligence are different in their nature, and a private nuisance arises out of a state of things on one man's property whereby his neighbour's property is exposed to danger," said Atkinson, J., in *Spicer and Another* v. *Smee*, [1946] 1 All E.R. 489. In this case the defendant had to pay damages for causing the destruction by fire of the plaintiff's bungalow. The fire was due to the state of the electric wiring in the defendant's adjacent bungalow, a nuisance of which the defendant should have been aware. It is no defence to a claim based on nuisance to show that all reasonable care has been taken; it is possible, however, to escape liability if it can be proved that the nuisance has been created by a trespasser or by a secret and unobservable operation of nature, unless, with knowledge or means of knowledge of its existence, the defendant suffers it to continue without taking reasonably prompt and efficient means for its abatement. Generally it is the occupier of premises who is liable for nuisances existing upon them during the period of his occupancy. The owner may be responsible if the nuisance is due to a breach by him of the covenant to repair the premises, but even so, the occupier is not exonerated because the landlord has this liability. The owner may also be liable if, prior to letting the premises, he created the nuisance by a positive act of misfeasance (as opposed to a non-feasance); or was aware or ought to have been aware of the nuisance, and let the premises without any covenant on the part of the tenant to repair or discontinue the nuisance.

An attempt is sometimes made to base a claim for fire damage on the principle in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330: this is to the effect that an occupier of land who keeps anything likely to do damage if it escapes, is bound, at his peril, to prevent its escape and, if he fails in this duty, is liable for the consequences irrespective of whether he has been negligent. In the case of *Collingwood* v. *Home and Colonial Stores. Ltd.*, [1936] 3 All E.R. 200, it was held that the installation of electrical wiring whether for domestic purposes or, as used by the defendant, for the purpose of a trade, was a reasonable and ordinary use of premises and that the principle of *Rylands* v. *Fletcher* did not apply where ordinary usage could be shown. Accordingly the defendant who was not negligent escaped liability for fire damage to the plaintiff's property.

The Fires Prevention (Metropolis) Act, 1774, which is not limited in this matter to the metropolis, provides that "no action, suit or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn or other building or on whose estate any fire shall accidentally begin." The Act does not apply as between landlord and tenant nor, apparently, as between bailor and bailee. There is a difference of legal opinion as to the precise meaning of the expression "accidentally begin." On the one hand, it is argued that if a fire, intentionally ignited—say in a hearth—accidentally spreads, it is within the expression. Against this view, it is contended that anyone who lights a fire on his premises has a responsibility to prevent it from escaping. This much is certain that the Act has no application when the fire is due to negligence or nuisance.

A railway expressly empowered by its statute to use locomotives is, subject to the exceptions mentioned hereafter, exempt from liability for damage to property caused by the escape of sparks from its engines whilst being used in accordance with the statute. The first exception is where the company is negligent in using (i) an engine of an improper type or (ii) an engine which is properly designed but improperly attended or (iii) an engine on a line besides which inflammable materials have been placed. In *Parker* v. *London and North Eastern Railway Co.*, [1946] W.N. 63, it was held that, in the matter of precautions against the emission of sparks from their engines, a railway company must keep abreast of new developments in other companies and other countries and must adopt reasonable measures for the prevention of damage. The plaintiff, upon whom the onus of proving negligence lay, succeeded in establishing his case, and was given judgment.

The other exception is provided by the Railway Fires Act, 1905, as amended by the Railway Fires Act (1905) Amendment Act, 1923. If damage is done to agricultural lands or crops by fire arising from sparks or cinders from a locomotive used on a railway, the company cannot escape liability by proving that the use of the locomotive was expressly authorized by statute, provided the claim does not exceed two hundred pounds. Written notice of the fire and intention to claim must be sent to the company within seven days and written particulars of the damage and amount claimed must be sent within twenty-one days of the damage. If the damage exceeds two hundred pounds, the claimant is entitled to abandon the excess, and claim the amount of two hundred pounds. To prevent or extinguish fire, a railway is authorized to enter upon any land and do all things, such as clear away the undergrowth, which is reasonably necessary, except cut down or injure trees, bushes, or shrubs, without the owner's consent. Compensation may be claimed by the person on whose land these rights are exercised.

A body which is not expressly authorized to use locomotives, but which has statutory authority to run a railway, is apparently

absolutely liable for damage caused by flying sparks. (*Jones* v. *Festiniog Railway Co.* (1868), L.R., 3 Q.B. 733.) The owner of a traction engine on a public highway has a similar liability. (*Powell* v. *Fall* (1880), 5 Q.B.D. 597.)

RIOT (DAMAGES) ACT, 1886

This Act entitles a person who has sustained loss by reason of any building (including premises appurtenant thereto), or its contents, or any machinery, being damaged or destroyed, or of the movable property being stolen, by any persons riotously and tumultuously assembled together, to claim compensation out of the police rate of the district. The compensation must be fixed with due regard to the conduct of the claimant: his attitude to the rioters and the nature of the precautions adopted by him are relevant factors.

If the person has received any sum by way of partial or total compensation from some other source, e.g. an insurer, he can claim from the police rate only the difference between the sum already received and the full compensation otherwise payable under the Act. The person who has already made a payment, e.g. the insurer, can claim in his own name for reimbursement out of the police rate, and any policy given by him must continue in force as if no claim had been made under it.

Claims have to be made in writing to the police authority of the district in which the destruction, theft or damage occurred. A claim form is obtainable from H.M. Stationery Office and this should be delivered to the police authority within fourteen days after the event. The genuineness of the claim will be investigated and such compensation paid as may appear just. A claimant who is aggrieved by the refusal or failure of the police authority to fix compensation or by the amount fixed may bring an action to recover the compensation.

ARSON

At common law, arson is the malicious setting fire to the dwelling-house of another, but by the Malicious Damage Act, 1861, it is now a felony for any person unlawfully and maliciously to set fire to—

(*a*) any church, chapel, meeting-house, or other place of divine worship,

(*b*) any dwellinghouse in which there is a person,

(*c*) any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, store-house, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land or in carrying on any trade or manufacture, whether the same is in the possession of the offender or of any other person, with intent thereby to injure or defraud any person, e.g. an insurer.

(*d*) any station, engine-house, warehouse, or other building

belonging to or appertaining to any railway, port, dock or harbour, or to any canal or other navigation,

(*e*) any public building,

(*f*) any mine of coal, cannel coal, anthracite or other mineral fuel,

(*g*) any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood or bark, or any steer of wood or bark,

(*h*) any ship or vessel, whether complete or in an unfinished state,

(*i*) any building not specified in the Act,

(*j*) any matter or thing being in, against, or under any building, in such circumstances that, if the building were thereby set fire to, the offence would be felony.

(*k*) any crops of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice or plantation of trees, or to any heath, gorse or fern.

An insurer should not repudiate a claim on the ground of arson unless there is sufficient evidence to secure a conviction. The circumstances may be such as to justify a repudiation on the grounds of fraud, and this may be easier to prove.

The Dockyards Protection Act, 1772, makes it a felony wilfully and maliciously to set on fire His Majesty's ships of war, dockyards, and certain military and naval stores.

The City of London coroner, by virtue of the City of London Fire Inquests Act, 1888, has power to inquire into the origin of a fire in case of loss or injury by fire within the City. He receives reports of all fires and if he considers it desirable, or if he is required so to do by the Lord Mayor, the Lord Chief Justice or by a Secretary of State, he exercises his jurisdiction in the same way as he does at an inquest upon a dead body. The depositions of the witnesses are taken in writing. Within seven days of the conclusion of the inquest, the coroner must send a written report to the Lord Mayor and Home Secretary, and copies of the report and depositions can be obtained by any person upon payment.

Outside the City—which for this purpose includes liberties situate in the county of Middlesex—a coroner has no jurisdiction to hold an inquest into the cause of a fire, unless fatal injury has resulted to a human being.

CHAPTER X

AGENCY

GENERAL DUTIES AND LIABILITIES

AN agent is one who acts for another. In fire insurance he may be engaged for various purposes, e.g. to establish privity of contract between his principal and some third party (i.e. to get business), or to assess a loss. He must exercise ordinary care and skill in the discharge of his duties. Any reward promised to him by a third party, apart from allowances customary in the business, cannot legally be accepted, and if received must be passed on to the principal. Corrupt transactions by, or with agents, are criminal offences punishable by fine and imprisonment. (Prevention of Corruption Act, 1906.) The agent must keep proper accounts, collect with promptitude any moneys due to his principal and pay them over to him. Except where justified by usage or the nature of the business, he normally must not delegate the duties that are entrusted to him. Any breach of duty makes the agent liable to the principal for loss sustained.

A principal must pay his agent such commission or remuneration, if any, as may have been agreed upon, and reimburse him any sums paid on his behalf. He may also be required to indemnify the agent in respect of acts lawfully done and liabilities incurred whilst acting within the scope of his authority.

So far as members of the public are concerned, an agent warrants that the authority he exercises is actually held by him, and they will be able to sue him for loss sustained by reason of a breach of this warranty. In his relations with members of the public who are unaware of any restrictions in his agent's powers, a principal is bound not only by acts done by the agent within his actual authority, but also by those acts falling within the ostensible authority which he has been allowed to assume. (*Murfitt* v. *Royal Insurance Co.* (1922), 38 T.L.R. 334.) So long as the agent's acts fall within his actual or apparent authority, the principal will be bound even although the agent acts in his own interests with intent to defraud.

APPOINTMENT

Either of the parties to an insurance contract may employ an agent to conduct the negotiations leading up to the completion of the agreement. In fact, the same person may be the agent of one party at one moment and the agent of the second party at another time as, for instance, where the insurer's agent is asked by the proposer to write, on his behalf, the answers to the questions on the proposal form. The fact that the agent is paid a commission by the insurer does not determine for whom he acts during the

various stages of the negotiations as it is customary for the insurer to pay the person who, for certain purposes, acts as the insured's agent. (*Bancroft* v. *Heath* (1900), 16 T.L.R. 138.) The insurer does not, however, pay the fees of an assessor appointed by an insured to protect his own interests.

An agent need not be formally appointed in writing—unless he is to make contracts under seal, in which event his appointment must be under seal—but may be given the necessary authority to do some duty, by word of mouth or conduct. Where the relationship of principal and agent can reasonably be inferred from words or conduct, the principal will not be allowed to repudiate it. This is said to be agency by estoppel.

In a very few cases the law confers authority on one person to act on behalf of another and the principal's consent is not required. These are known as agencies of necessity. For instance, a husband is under obligation to maintain his wife and if adequate provision is not made suitable to the style of living adopted by the husband the law confers upon her authority to acquire necessaries on his credit.

Sometimes a person acts for another without the latter's knowledge. The latter person then has the option of ratifying the act and, if he does so, he adopts the contract made for him. It is important that the negotiations leading up to the contract should be undertaken—though without previous authority—for the principal who is in contemplation and for such things as the principal may lawfully do. The principal must be in existence at that time; consequently the act of a person negotiating on behalf of a company not yet incorporated cannot be ratified subsequently when the company comes into existence. (See page 21 as to ratification of a fire insurance contract.)

An agent need not have full contractual capacity to enable him to commit his principal to the terms of an agreement, but the principal himself must have legal capacity to enter into it.

INSURER'S AGENT

"An insurance company always acts by agents," said Mr. Justice Kay in *Re Norwich Equitable Fire Insurance Society* (1887), 57 L.T. 241. A company, being a legal creation, and not a creation of flesh and blood, cannot act in person. Everyone entitled to act on behalf of the company is an agent. The directors and senior officials are sometimes said to be general agents, but even their powers are prescribed by the memorandum and articles of association of the company. Other members of the staff, as well as the part-time agents, have more restricted powers.

Not all persons who appear to be agents of an insurer are to be regarded as such. Some professional men, whose business is not normally to arrange insurances, are paid a commission for introducing to an insurer proposals from their clients. They are really acting as agents of the proposers and, in the absence of express or implied

agreement to the contrary, must account to their clients for the commission. (*Workman and Army and Navy Auxiliary Co-operative Supply, Ltd.* v. *London and Lancashire Fire Insurance Co.* (1903), 19 T.L.R. 360.) If, then, such an intermediary is given some information which is material to the risk, and fails to pass it on to the insurer, knowledge of the facts will not be imputed to the insurer.

The typical part-time agent of an insurer is formally appointed. His letter of appointment makes it clear that he is appointed solely for the purpose of introducing business and collecting premiums[1] and that he must not accept or amend insurances, commit the insurer in any way, give credit, or deal with claims, except with the express permission of the insurer. Upon termination of the appointment neither the agent nor his legal representatives shall have any claim against the insurer for commission accruing after the date of termination, or for compensation.

When such an agent is dealing with an inquiry which does not involve the use of a proposal form, and it is established by the proposer that, for the purpose of the negotiations in question he was the agent of the insurer, the proposer is entitled to assume that if he discloses all material facts to the agent, the information will be passed on to the insurer, and the insurer is bound by the agent's knowledge. Also any material facts which come to the notice of the agent, or of which he ought to have been aware in the course of the transaction, will be deemed to be known to the principal. Where the agent incorrectly explains the insurance, the consequences depend upon whether the inaccuracy relates to an existing fact or to an opinion as to the legal effect of the policy. If the inaccuracy is with regard to an existing fact, the insured may have the policy rescinded and his premium returned. If, on the other hand, the insured's complaint is of the agent's erroneous opinion as to the legal effect of the contract, he will not be granted rescission. (*Re Hooley Hill Rubber and Chemical Co. and Royal Insurance Co.*, [1920] 1. K.B. 257.)

Wider still is the authority of the agent who can accept a risk on behalf of the insurer. In this country, the authority in such cases —which are comparatively rare—is usually restricted to granting insurance during the period for which cover notes are issued. It must be borne in mind, however, that although as between the agent and the insurer the extent of the agent's authority depends upon the express or implied terms of the agency, the public are entitled to assume, in the absence of notice to the contrary, that the authority actually entrusted to him corresponds with his apparent authority, and the principal may be bound by an act not actually authorized. (*Murfitt* v. *Royal Insurance Co.* (1922), 38 T.L.R. 334.)

PROPOSAL FORMS

There are some risks for which proposal forms are used, and in

[1] Some agents are not authorized to collect premiums.

dealing with these the insurer's agent may write the answers to the printed questions. If the proposer's answers are taken down as dictated, it is obvious that the proposer alone will be responsible for any concealment or misrepresentation. If, on the other hand, the proposer gives the correct answers verbally and the agent innocently or fraudulently fails to convey them accurately to the insurer, different considerations arise.

Where the proposal is by the terms of the policy incorporated in the policy and made the basis of the contract and the proposer signs the form but asks the insurer's agent to fill in the answers, there is little doubt that, for the purpose of completing the proposal form, the intermediary must be regarded as the proposer's agent, and the insurer is not to be deemed to have the knowledge which the intermediary has failed to convey. (*Newsholme Bros.* v. *Road Transport and General Insurance Co.* (1929), 45 T.L.R. 573.) It makes no difference whether the agent acts innocently or fraudulently nor whether the proposer signs the form before or after the answers are inserted: the intermediary is the proposer's agent.

Where, however, the proposal is not incorporated in the policy and made the basis of the contract, the position is not quite so clear. There is every justification for saying that the agent, in completing the proposal form, is the agent of the proposer, and that any misrepresentation will avoid the policy. If, however, there is an omission of information which the proposer might reasonably leave to the agent to ascertain by a survey of the risk, it is probable that the proposer would not be prejudiced by the omission.

TERMINATION OF AGENCY

Except occasionally in the case of senior officials an insurer does not usually bind himself to appoint agents for long periods. Members of the staff require to be given a month's or a week's notice; part-time agencies can usually be cancelled at any time. A principal should notify third parties, who have been led to treat the intermediary as his agent, that the authority has been terminated, otherwise, in the absence of information, they will be entitled to continue dealing with the agent. The death (or if the principal is a company, the liquidation) of the principal terminates the authority of the agent except in certain circumstances where he has been given a power of attorney. (See Sect. 124, 126, and 127 of the Law of Property Act, 1925.)

INSURED'S AGENT

Like an insurance company, an insured which is a company must necessarily act through agents. In many other cases, however, insurances are arranged through an intermediary known as a broker, acting on behalf of the insured. Insurances placed at Lloyd's must always be arranged through a Lloyd's broker. A Lloyd's broker is always the insured's agent. The insured's agent

must disclose all material facts which he or his prinicipal knows or ought to know in the ordinary course of business. Any omission to do so, as well as any concealment or misrepresentation will be imputed to the insured, even although the insured may have been perfectly frank with his agent. Where, through the negligence or misconduct of the agent, the principal is unable to enforce the insurance contract, or the contract fails to conform with his instructions, the principal will usually be able to sue the broker, irrespective of whether the latter acted gratuitously or for a consideration. The damages awarded would cover the amount which the principal would have been able to claim in respect of any fire loss sustained.

If the agent is unable to complete an insurance which he has been instructed to arrange, he should inform his principal without delay, to permit of other inquiries and arrangements being made.

Notwithstanding that a Lloyd's broker acts as agent for the insured he is, by usage, liable personally to the underwriter for payment of the premium. Similarly the provincial broker who passes the business to the Lloyd's broker is personally liable to the latter.

LOSS ASSESSORS

Insurers customarily entrust the investigation and adjusting of all but the smallest claims to fire loss assessors. They are agents with only limited authority and cannot usually waive proof of loss or agree to a settlement at a specified figure. Consequently the insured is not able to force the insurer to pay any amount which may have been mentioned by the assessors. The insured may also instruct assessors to act on his behalf and at his expense though this is seldom considered necessary in practice.

CHAPTER XI

ASSURANCE COMPANIES ACTS

THE principal Act relating to the carrying on of insurance business is the Assurance Companies Act, 1909. Under this statute fire insurance business is defined as the issue of, or the undertaking of, liability under policies of insurance against loss by, or incidental to, fire.

All persons or bodies of persons, not being registered as friendly societies or trade unions, who carry on within the United Kingdom fire insurance business are subject to the provisions of the principal Act. A company, registered under the Companies Acts, which transacts fire insurance business in any part of the world, is deemed to be a company transacting such business within the United Kingdom. Failure to comply with the Act renders the insurer concerned liable to a penalty, but it does not vitiate his contracts. Many insurers, being limited companies, are subject to the provisions of the Companies Act, 1948, but a discussion of the effects of this statute is outside the scope of this book.

DEPOSIT

The Assurance Companies Act, 1909, provided that every company carrying on fire insurance business should deposit and keep deposited with the Paymaster-General, for and on behalf of the Supreme Court, the sum of twenty thousand pounds. The deposit could only be accepted on a warrant from the Board of Trade, and it was to be invested in such of the securities usually accepted by the court for the investment of funds placed under its administration as the company might select. The interest accruing due on the securities was to be paid to the company.

The deposit was not required where: (*a*) the company commenced to carry on fire insurance business within the United Kingdom prior to the 3rd, December, 1909; or (*b*) the company was an association of owners or occupiers of buildings or other property, which satisfied the Board of Trade that it was carrying on, or was about to carry on, business wholly or mainly for the purpose of the mutual insurance of its members against damage by, or incidental to, fire caused to the houses or other property owned or occupied by them; or (*c*) the company had made a deposit for any other class of assurance business.

Under the Assurance Companies Act, 1946, no company is to be required to make a deposit and the Board of Trade is to make rules[1] for allowing a company to withdraw any deposit already made. Companies transacting fire insurance business must, in order to qualify for the return of the deposit, maintain the margin of solvency referred to below.

[1] S.R. & O. 1946. No. 1362.

MINIMUM PAID UP CAPITAL

Subject to certain exceptions, no person may now carry on fire insurance business in Great Britain except an incorporated company having a paid-up share capital of not less than fifty thousand pounds.

If any unauthorized person contravenes this provision then—

(*a*) in the case of a person who is not a body corporate, he shall be liable on summary conviction to imprisonment for a term not exceeding three months, or on conviction on indictment to imprisonment for a term not exceeding two years; and

(*b*) in the case of a body corporate—

(i) the body corporate may be wound up by the court under the Companies Act, 1948, on a petition of the Board of Trade presented by leave of the court; and—

(ii) any director, manager, secretary or other agent of the body corporate shall be liable to the penalty provided in paragraph (*a*) above, unless he proves that the contravention occurred without his knowledge or that he used due diligence to prevent the occurrence thereof.

These provisions relating to a minimum paid-up capital do not apply to a company which, immediately before the 29th October, 1945, was carrying on in Great Britain assurance business of any class to which the principal Act applies, in compliance with such of the provisions of the principal Act as then applied to the company and to that class of business.

The statutory declaration required by Sect. 109 of the Companies Act, 1948, to be delivered to the Registrar of Joint Stock Companies before a company to which that section applies commences business shall, in the case of a company registered after the 6th March, 1946, the objects of which include the carrying on of fire insurance business, include a statement that not less than fifty thousand pounds of the company's share capital has been paid up.

MARGIN OF SOLVENCY

An assurance company carrying on "general business"—which expression includes fire insurance business—shall be deemed, for the purposes of Sect. 222 of the Companies Act, 1948 (which authorizes the court to order the compulsory winding up of a limited company), to be unable to pay its debts if the value of its assets does not exceed the amount of its liabilities by whichever is the greater of the following amounts, namely—

(*a*) fifty thousand pounds; or

(*b*) one-tenth of the "general premium" income of the company in its last preceding financial year;

and the Assurance Companies (Winding up) Acts, 1933 and 1935—which empower the Board of Trade to petition the court to wind up a company unable to pay its debts—shall apply accordingly. (Sect. 3 of the Assurance Companies Act, 1946.)

In computing the amount of the liabilities, all contingent and prospective liabilities shall be taken into account, but not liabilities in respect of share capital.

The general premium income for this purpose is to be taken as the net amount, after deduction of any premiums paid by the company for re-insurance, of the premiums received by the company in respect of all assurance business (including the non-statutory classes) other than long term business, i.e. life assurance, industrial assurance and bond investment business or any business incidental to those classes.

The provisions relating to the margin of solvency shall not apply to any assurance company which at the commencement of the Act, i.e. 6th March, 1946, is carrying on general business (whether in Great Britain or elsewhere) until the expiration of the period of two years, or such longer period as the Board of Trade may in any case allow, from the commencement of the Act. In the case of any such company which, immediately before the 29th October, 1945, was carrying on in Great Britain assurance business of a class to which the principal Act applies, the provisions shall not apply unless—

(*a*) the company within the two years or longer period withdraws any sum deposited under the principal Act, in which event, the margin of solvency provisions shall apply to the company from the date of the withdrawal, or

(*b*) the company, on or after the 29th October, 1945, and before the expiration of the said two years or longer period, has commenced or commences to carry on (whether in Great Britain or elsewhere) assurance business, of any class to which the principal Act applies, which it was not carrying on immediately before the 29th October, 1945, in which event the margin of solvency provisions shall apply to the company from the commencement of the Act, or from the time when it commences to carry on business of that class, whichever is the later.

Neither do the provisions apply to any other company until a period of two years, or such longer period as the Board of Trade may in any case allow, has expired from the date of its commencing to carry on general business.

ACCOUNTS AND BALANCE SHEETS

Every assurance company shall, at the expiration of each financial year of the company, prepare—

(*a*) A revenue account for the year in the form or forms set forth in the First Schedule to the principal Act.

(*b*) A profit and loss account in the form set forth in the Second Schedule, except where the company carries on one class of assurance business only, and no other business.

(*c*) A balance sheet in the form set out in the Third Schedule.

SCHEDULES

Section 4

FIRST SCHEDULE

(B) *Form applicable to Fire Insurance Business*

Revenue Account of the..... .....for the Year ending..... .....19... ....in respect of Fire Insurance Business.

	£ s. d.	£ s. d.		£ s. d.	£ s. d.
Amount of fire insurance fund at the beginning of the year—			Claims under policies paid and outstanding		
Reserve for unexpired risks			Commission		
Additional reserve (if any)			Expenses of management		
			Contributions to fire brigades		
Premiums			Other payments (accounts to be specified)—		
	£ s. d.		Amount of fire insurance fund at the end of the year as per Third Schedule—	£ s. d.	
Interest, dividends, and rents			Reserve for unexpired risks being . . per cent of premium income for the year		
Less income tax thereon			Additional Reserve (if any)		
Other receipts (accounts to be specified)					
	£			£	

NOTE 1. Items in this Account to be net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2. If any sum has been deducted from the expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

Section 4

SECOND SCHEDULE

PROFIT AND LOSS ACCOUNT OF THE FOR THE YEAR ENDING 19

	£ s. d.	£ s. d.	£ s. d.
Balance of last year's account			Dividends and bonuses to shareholders
Interest and dividends not carried to other accounts	£ s. d.		Expenses not charged to other accounts
Less income tax thereon			Loss realized (accounts to be specified)
Profit realized (accounts to be specified)			Other payments (accounts to be specified)
Other receipts (accounts to be specified)			Balance as per Third Schedule
	£		£

Section 4

THIRD SCHEDULE

Balance Sheet of the.....on the.....19.....

LIABILITIES	£ s. d.	ASSETS	£ d.
Shareholders' capital paid up (if any) £		Mortgages on property within the United Kingdom	
Life assurance funds[1]—		Do. do. out of the United Kingdom	
Ordinary branch		Loans on parochial and other public rates	
Industrial do.		Do. Life interests	
Annuity fund[1]		Do. Reversions	
Fire insurance fund		Do. Stocks and shares	
Accident insurance fund		Do. Company's policies within their surrender values	
Employers' liability insurance fund		Do. Personal security	
Bond investment and endowment certificate fund		Investments—	
Marine insurance fund		Deposits with the High Court (securities to be specified)	
Sinking fund and capital redemption fund		British Government securities	
Profit and loss account		Municipal and county securities, United Kingdom	
Other funds (if any) to be specified		Indian and Colonial Government securities	
	£	Do. provincial securities	
		Do. municipal do.	
		Foreign Government securities	

Claims admitted or intimated but not paid[2]		Do. provincial securities	
Life assurance		Do. municipal do.	
Fire insurance		Railway and other debentures and debenture stocks—	
Bond investment		Home and Foreign	
		Railway and other preference and guaranteed stocks	
Annuities due and unpaid[2]		Do. ordinary stocks	
Other sums owing by the company[2] (to be stated separately under each class of business).		Rent charges	
		Freehold ground rents	
		Leasehold do.	
		House property	
		Life interests	
		Reversions	
		Agents' balances	
		Outstanding premiums[2]	
		Do. interest, dividends, and rents[2]	
		Interest accrued but not payable[2]	
		Bills receivable	
		Cash—On deposit	
		In hand and on current account	
		Other assets (to be specified)	
£		£	

[1] Life companies having separate annuity fund to show amount thereof separately.

[2] These items are or have been included in the corresponding items in the First Schedule.

NOTE 1. When part of the assets of the company are specifically deposited, under local laws in various places out of the United Kingdom, as security to holders of policies there issued, each such place and the amount compulsorily lodged therein must be specified in respect of each class of business, except that, in the case of fire, accident, or employers' liability insurance business, it shall be sufficient to state the fact that a part of the assets has been so deposited.

NOTE 2. A Balance Sheet in the above form must be rendered in respect of each separate fund for which separate investments are made.

NOTE 3. The Balance Sheet must state how the values of the Stock Exchange securities are arrived at, and a certificate must be appended, signed by the same persons as sign the Balance Sheet, to the effect that in their belief the assets set forth in the Balance Sheet are in the aggregate fully of the value stated therein less any investment reserve und taken into account. In the case of a company transacting life assurance business or bond investment business, this certificate is to be given on the occasions only when a statement respecting valuation under the Fourth Schedule is made.

NOTE 4. In the case of a company required to keep separate funds under section 3 of this Act, a certificate must be appended, signed by the same persons as signed the Balance Sheet and by the auditor, to the effect that no part of any such fund has been applied, directly or indirectly, for any purpose other than the class of business to which it is applicable.

Regulations made by the Board of Trade may require that in every such balance sheet of a company carrying on general business there shall be included a certificate—

(*a*) in such form and signed by such persons as may be prescribed by the regulations; and

(*b*) containing such a statement with respect to the assets and liabilities of the company as may be so prescribed for the purposes of the margin of solvency provisions, and if any company fails to comply with the regulations, the value of its assets shall in any proceedings for its winding up be deemed, until the contrary is proved, not to exceed the amount of its liabilities by the required margin of solvency.

Every account and balance sheet must be printed and four copies, one of which is to be signed by the chairman and two directors and also by the company's principal officer and managing director, if any, must be deposited at the Board of Trade within six months after the close of the period to which they relate. The six months may be extended by such period, not exceeding three months, as the Board may think fit. A copy of any report on the affairs of the company, submitted to the shareholders or policyholders, must be deposited at the same time.

Where an assurance company registered under the Companies Acts deposits its accounts and balance sheet with the Board of Trade, it may send another copy to the Registrar who will accept them in lieu of the statement required under the Companies Act, 1948, and the copy so sent must be dealt with as if it were a statement sent under the Companies Act, 1948.

A printed copy of the last deposited accounts must be forwarded to any shareholder or policyholder who applies for one. Moreover any person may inspect copies of the documents and obtain copies on payment of a prescribed fee.

AUDIT

Where the accounts of an assurance company are not subject to audit in accordance with the provisions of the Companies Act, 1948, or the Companies Clauses Consolidation Act, 1845, relating to audit, the accounts of the company must be audited annually in such manner as the Board of Trade may prescribe, and the regulations made for the purpose may apply the audit provisions of the Companies Act, 1948, subject to such adaptations and modifications as may appear necessary or expedient.

LIST OF SHAREHOLDERS

All companies, which are not incorporated under the Companies Acts and therefore obliged to keep a register of members, must keep a "shareholders' address book" in accordance with Sect. 10 of the Companies Clauses Consolidation Act, 1845. On the application of

any shareholder or policyholder, they must furnish him with a copy of the book, in consideration of a sum not exceeding sixpence for every hundred words required to be copied.

DEED OF SETTLEMENT

Every assurance company not registered under the Companies Acts must have printed a sufficient number of copies of its deed of settlement to be able to furnish any shareholder or policyholder with a copy on application. The charge must not exceed one shilling per copy.

PUBLICATION OF CAPITAL

Where any notice, advertisement or other official publication of an assurance company contains a statement of the amount of the authorized capital of the company, the publication must also contain a statement of the amount of the capital which has been subscribed and the amount paid up.

AMALGAMATION OR TRANSFER

The Act of 1909 contains provisions relating to the amalgamation of assurance companies and the transfer of business from one company to another. By virtue of the Act of 1946, however, the amalgamation provisions apply only where one or both of the companies carries on employer's liability insurance business, life assurance business, industrial assurance business, or bond investment business; and the provisions relating to the transfer of business apply only to such classes. As the amalgamation provisions apply even to fire insurance, when one of the aforementioned classes is also transacted, it is necessary to refer to them.

Where it is intended to amalgamate two or more assurance companies, the directors of any one or more of the companies must apply to the court, by petition, to sanction the proposed arrangement. After hearing the directors and other persons whom it considers entitled to be heard, the court may grant its sanction, if it is satisfied that no sufficient objection has been established.

So that persons interested may be able to decide whether they should raise objection, the following steps must be taken before application is made to the court—

(*a*) notice of the intention to make the application must be published in the *Gazette*;

(*b*) a statement of the nature of the amalgamation together with an abstract containing the material facts embodied in the agreement or deed under which the amalgamation is proposed to be effected, and copies of the actuarial or other reports upon which the agreement or deed is founded, including a report by an independent actuary must, unless the court otherwise directs, be transmitted to each life, endowment, sinking fund and bond investment policyholder

of each company in the manner provided by Sect. 136 of the Companies Clauses Consolidation Act, 1845, for the transmission to shareholders of notices not requiring to be served personally; and

(*c*) the agreement or deed under which the amalgamation is effected must be open for the inspection of the policyholders and shareholders at the offices of the companies for a period of fifteen days after the publication of the notice in the *Gazette*.

STATEMENTS IN CASE OF AMALGAMATION

Where an amalgamation takes place, the combined company must, within ten days from the date of the completion of the amalgamation, deposit with the Board of Trade—

(*a*) certified copies of statements of the assets and liabilities of the companies concerned in the amalgamation, together with a statement of the nature and terms of the amalgamation, and

(*b*) a certified copy of the agreement or deed under which the amalgamation is effected, and

(*c*) certified copies of the actuarial or other reports upon which that agreement or deed is founded; and

(*d*) a declaration under the hand of the chairman of each company, and the principal officer of each company that, to the best of their belief, every payment made or to be made to any person whatsoever an account of the amalgamation is therein fully set forth, and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities, or other property by or with the knowledge of any parties to the amalgamation.

SPECIAL PROVISIONS AS TO WINDING UP

An assurance company may be wound up in accordance with the provisions of the Companies Act, 1948.

In addition to the usual grounds on which a company may be liquidated, an assurance company may be wound up on the petition of ten or more policyholders owning policies of an aggregate value of not less than ten thousand pounds. Leave must first be obtained from the court, and this will not be granted unless a prima facie case has been established to the satisfaction of the court and security has been given for costs.

Under the Assurance Companies (Winding up) Acts of 1933 and 1935 the Board of Trade may also petition for the winding up of an assurance company on the ground that it is unable to pay its debts within the meaning of Sects. 222 and 223 of the Companies Act, 1948. The Board may, by written notice, require a company to furnish within a specified time such explanations, information, accounts, balance sheets, abstracts and statements as they consider necessary to determine whether the company is insolvent at any specified date (not earlier than the close of the period to which the last deposited accounts and balance sheet relate). The Board

may require any of the documents to be signed by such number of the directors and such officers of the company as may be specified, and to be certified as correct by an approved auditor or actuary or both.

If, after service of the notice, the company does not comply with the Board's requirements before the expiration of the specified time, or the company complies with the requirements and the Board considers it expedient to make further inquiries, a notice may be sent to the company stating that the Board propose to appoint one or more inspectors to investigate the affairs of the company and to report thereon, and unless the company, within seven days from the date of the service of the notice, gives notice in writing that it objects, the Board may, after the expiration of that period, make such an appoinment.

Should the company give written notice of its objection within the period of seven days, the Board may apply to the court for leave to make such an appointment. Leave will be granted unless the court is satisfied that such an appointment cannot reasonably be required.

Where an inspector is appointed, the provisions of Sections 166 and 167 of the Companies Act, 1948, apply and any such refusal as is, or might be, made the ground of the punishment of an officer or agent of the company under subsection (3) of Sect. 167 is also a ground on which the company may be wound up, on the petition of the Board of Trade, by leave of the court.

WINDING UP OF SUBSIDIARY COMPANIES

The court is empowered in certain circumstances to order that a subsidiary company shall be wound up in conjunction with the principal company if the latter is being wound up by, or under the supervision of, the court.

VALUATION OF POLICIES

An insured with an unexpired policy can prove in the winding up even though no loss has occurred. The value of a current policy is such portion of the last premium paid as is proportionate to the unexpired portion of the period for which the premium was paid. Where a company is being wound up by the court, or subject to its supervision, the liquidator must give notice to persons appearing to be interested in subsisting contracts, of the value of their policies. A policyholder is bound by such value unless notice is given of his intention to dispute it in the manner and within a time to be prescribed by a rule or order of the court.

REDUCTION OF CONTRACTS

In the case of a company which has been proved to be unable to pay its debts, the court may reduce the amounts of its contracts in place of making a winding-up order.

ENALTIES

Any company which defaults in complying with the principal Act is ble to a penalty not exceeding £100, or, in the case of a continuing fault to a penalty not exceeding £50 for every day during ich the default continues. Moreover, every director, manager or cretary, or other officer or agent of the company who is knowingly party to the default is liable to a like penalty.

If the default continues for a period of three months after notice default by the Board of Trade, the default is a ground on which e court may order the winding up of the company.

If any person signs any account, balance sheet, abstract, statement, or other document required by the Act, knowing that it is lse, he is guilty of a misdemeanour and is liable on indictment fine and imprisonment, or on summary conviction to a fine not ceeding fifty pounds.

LOYD'S AND OTHER ASSOCIATIONS OF UNDERWRITERS

The Act of 1909 contained, in the Eighth Schedule, special provisions applying to members of Lloyd's or other approved associaons. Underwriters who complied with the requirements of the ghth Schedule were not subject to the other provisions of e Act.

Under the Act of 1946, underwriters are still treated as a special ass. The committee of Lloyd's, and the managing body of any pproved association must deposit every year with the Board of ade a statement, in such form as may be prescribed by regulations ade by the Board, summarizing the extent and character of the surance business done by its members in the twelve months to ich the statement relates; and the regulations may require rtain classes or descriptions of business to be dealt with separately.

As from such day as the Board of Trade may by order appoint ere shall be substituted for the Eighth Schedule to the principal t the following Schedule—

Eighth Schedule

Requirements to be complied with by underwriters being members Lloyd's or of any other association of underwriters approved by e Board of Trade.

1.—(1) Every underwriter shall in, accordance with the provisions a trust deed approved by the Board of Trade, carry to a trust nd all premiums received by him or on his behalf in respect of ıy assurance business.

(2) Premiums received in respect of long term business shall in case be carried to the same trust fund under this paragraph as emiums received in respect of general business, but the trust deed ay provide for carrying the premiums received in respect of all or ıy classes of long term business and all or any classes of general

business either to a common fund or to any number of separate funds.

2.—(1) The accounts of every underwriter shall be audited annually by an accountant approved by the Committee of Lloyd's or the managing body of the association, as the case may be, and the auditor shall furnish a certificate to the Committee or managing body and to the Board of Trade in such form as the Board may by regulations prescribe.

(2) The said certificate shall in particular state whether in the opinion of the auditor the value of the assets available to meet the underwriter's liability in respect of assurance business is correctly shown in the accounts, and whether or not that value is sufficient to meet the liabilities calculated—

(*a*) in the case of liabilities in respect of long term business by an actuary; and

(*b*) in the case of other liabilities, by the auditor on a basis approved by the Board of Trade.

(3) Where any liabilities of an underwriter are calculated by an actuary under the last foregoing sub-paragraph, he shall furnish a certificate of the amount thereof to the committee of Lloyd's or the managing body of the association, as the case may be, and to the Board of Trade, and shall state in his certificate on what basis the calculation is made; and a copy of his certificate shall be annexed to the auditor's certificate.

3. The underwriter shall, when required by the committee of Lloyd's or the managing body of the association, as the case may be, furnish to them such information as they may require for the purpose of preparing the statement as to the business done by its members which is to be deposited by them with the Board of Trade.

MUTUAL ASSOCIATIONS

Where, on the application of any association of persons, whether incorporated or not, the Board of Trade are satisfied that the association—

(*a*) is carrying on or about to carry on fire insurance business; and

(*b*) is not carrying on or about to carry on that business except for the purpose of the mutual insurance of its members against damage caused to buildings or other property owned or occupied by them; the Board may by order direct that the provisions in the 1946 Act relating to the minimum paid up share capital and the margin of solvency shall not apply to the association on condition that it carries on no business other than fire insurance business and business incidental thereto. The order may be revoked—

(*a*) on the application of the association, or (*b*) if the Board cease to be satisfied of the matters on the ground of which the order was made, or (*c*) if the Board are satisfied that the condition specified in the order has not been complied with.

COMPANY ESTABLISHED OUTSIDE GREAT BRITAIN

The Board are empowered to make regulations adapting the references in the 1946 Act to the minimum paid-up share capital and fifty thousand pounds so as to make them applicable to an assurance company established in a country outside Great Britain.

GUARANTEED COMPANY

Special provisions are included in the 1946 Act to apply to an assurance company carrying on general, e.g. fire, business where that company is guaranteed by

(*a*) a body corporate which has a paid-up share capital of not less than fifty thousand pounds and the value of whose assets exceeds the amount of its liabilities by the margin of solvency already explained, or

(*b*) an underwriter who is a member of Lloyd's or of an approved association and who complies with the requirements of the Eighth Schedule, or

(*c*) an assurance company as respects which, as being itself guaranteed by another assurance company, the Board have ordered that the margin of solvency provisions shall not apply.

The Board may by order direct that, subject to such conditions as may be specified in the order, the margin of solvency provisions shall not apply to the guaranteed company.

An assurance company is deemed to be guaranteed by another assurance company if, but only if, all its liabilities to policyholders in respect of assurance business of any class to which the principal Act applies are reinsured with, or guaranteed by, the other assurance company.

INSURANCE OF A LIMITED CLASS WITH COMMON INTEREST

Where, on the application of an assurance company, the Board of Trade are satisfied—

(*a*) that it carries on business wholly or mainly for the purpose of insuring a limited class of persons having financial or other interest in common; and

(*b*) that, having regard to the limited nature of its business, the margin of solvency provisions are inappropriate or unduly onerous to the company,

the Board may by order direct that, subject to such conditions as may be specified in the order, the said provisions shall not apply to the company, or shall apply so as to require that the value of the company's assets shall exceed the amount of its liabilities by a less amount than that mentioned in the Act.

SPECIAL TREATMENT OF GENERAL BUSINESS

Where, on the application of an assurance company carrying on general business of any class, not being a class for which a separate

fund is required, the Board of Trade are satisfied that, in the special circumstances of the company—

(*a*) that business or any part thereof ought to be treated as if it were not business of that class but were either

(i) general business of some other class, not being a class for which a separate fund is required or

(ii) business to which the principal Act does not apply or

(*b*) that the business ought to be treated as if it were long term business,

the Board may by order direct that, subject to such conditions as may be specified in the order, it shall be so treated.

An order directing that any business shall be treated as if it were business to which the principal Act does not apply is required to specify, as a condition, that the company carries on other business which is general business and which is not directed to be treated as if it were business to which the principal Act does not apply, or as if it were long term business.

CHAPTER XII

REINSURANCE

DEFINITION

A CONTRACT of reinsurance is a legally binding agreement under which one party, known as the reinsurer, undertakes to indemnify the other party, the reinsured, in the manner and to the extent agreed, against liability resting upon the latter as insurer under some contract or contracts of insurance.

A reinsurance which relates to the liability on a single insurance is described as "facultative," whereas one arranged to cover liabilities on many insurances is known as a "treaty."

FACULTATIVE

Where reinsurance is required on a single insurance, the insurer submits details to the proposed reinsurers in a "request note." Acceptance is intimated by means of a "take note." The main reason for such a reinsurance is that the reinsured considers his interest in a risk, or in contiguous risks, excessive, and prudence dictates that he should divest himself of a portion of the potential liability.

TREATY

In order to carry on their business smoothly and expeditiously, insurers require to know in advance that reinsurance facilities are available for normal risks. They enter, therefore, into reinsurance treaties under which reinsurers undertake to accept, in respect of all policies that may be issued, such liabilities as fall within the treaty wording. In *Lower Rhine and Wurtemburg Insurance Association* v. *Sedwich*, [1899] 1 Q.B. 179, it was decided that, when expressed in suitable terms, a treaty will cover the liabilities arising under policies effected subsequently.

Very many different types of treaty are used by fire insurers. A surplus treaty is one which applies only to the balance (if any) of a risk after the original insurer has retained the amount that is considered appropriate. Losses are borne by insurer and reinsurer in proportion to their respective interests. A quota share treaty provides for the reinsurers to take a predetermined proportion of each and every risk. An excess of loss treaty fixes the reinsurer's liability as the excess of a certain sum; any loss less than that amount is wholly borne by the insurer. An excess of loss–ratio treaty protects the entire account from a loss–ratio exceeding a certain figure.

The agreement between the reinsured and the reinsurer is expressed in the treaty and separate policies are not issued by the

reinsurer for each reinsurance. The reinsured supplies such details as the reinsurer requires of cases covered by the treaty in statements known as bordereaux, each individual reinsurance under the treaty being called a cession.

INSURABLE INTEREST

Since an insurer has a potential liability under every subsisting policy that he has issued, he has an insurable interest in each risk. (*Uzielli* v. *Boston Marine Insurance Co.* (1884), 15 Q.B.D. 16.) His interest is, however, contingent upon the insured under the original policy having an interest in the subject-matter. Without such an interest, both insurance and reinsurance are void.

In no circumstances does the original insured acquire any right in the reinsurance. His contract is with the insurer (i.e. the reinsured) against whom he must claim for any loss sustained. (*Forsikringsaktieselskabet National of Copenhagen* v. *Attorney-General*, [1925] A.C. 642.) If, therefore, the insurer becomes insolvent, the insured cannot require payment of whatever is due from the reinsurer, for that amount forms part of the general assets of the insurer for the benefit of all creditors.

UTMOST GOOD FAITH

In effecting a facultative reinsurance, the reinsured must disclose to the reinsured all material facts which are, or which ought to be, known to him and representations of such facts must be accurate. It is not a material fact that the contract is one of reinsurance and not of insurance. (*Mackenzie* v. *Whitworth* (1875), 1 Ex. D. 36.) Where, however, the contract is understood to be one of reinsurance and the reinsured represents that he will retain a certain amount of the risk, this will be a material fact which would influence the judgment of a prudent reinsurer and constitutes a promise which must be fulfilled. (*Traill* v. *Baring* (1884), 4 De G. J. & S. 318.) It is not material that the premium required for the reinsurance exceeds that which is received for the insurance. (*Glasgow Assurance Corporatiom* v. *Symondson* (1911), 16 Com. Cas. 109.)

A treaty is also a contract requiring the utmost good faith, and all material facts should be disclosed. This does not mean that as each risk comes under the treaty the duty of disclosure arises. With an obligatory treaty, the reinsurers are committed to provide the necessary reinsurance on each new risk; their judgment is exercised only when they agree to enter into the treaty and it is at that moment that the duty of disclosure comes to an end. An illustration of the application of the doctrine of the utmost good faith to treaty reinsurance is to be found in *General Accident Fire and Life Assurance Corporation* v. *Campbell* (1925), 31 Ll. L.L.R. 151. In this case, it was held that the treaty was invalidated because, during the negotiations leading up to the treaty, the reinsurer had

not been properly advised as to the seriousness of outstanding claims.

TERMS OF THE REINSURANCE

A facultative reinsurance is usually made subject to the same conditions as the original policy. When this is so, the conditions, in so far as they are not inconsistent with the reinsurance, are incorporated in it. Occasionally a reinsurance is written on a policy form printed for an original insurance and which, therefore, contains conditions with which the reinsured cannot comply. Such conditions are to be ignored.

The cessions under a treaty are also generally stated to be subject to the conditions of the original insurance, which the insurers are free to vary.

LIABILITY UNDER REINSURANCE

The reinsurer undertakes to indemnify the reinsured in respect of the whole or some portion of the latter's liability, and in the absence of a contrary stipulation, the liability must be a legal one. An ex gratia payment, or a payment irrespective of liability, does not entitle the reinsured to claim from the reinsurer. If, therefore, the reinsured desires to settle a claim on a basis going beyond his legal liability, he should obtain the consent of the reinsurer.

This is not usually necessary under a treaty for the reinsured is expressly given the liberty to settle claims and arrange compromises or make ex gratia payments without consulting the reinsurers. The right to bind the reinsurer in all cases is not obtained by the fairly common provision "to pay as may be paid." In *Marten* v. *Steamship Owners Underwriting Association* (1902), 87 L.T. 210, it was decided that with such a wording the reinsurer was liable to pay only the amount that the reinsured was legally obliged to pay. Another fairly common provision is that the reinsurer shall follow the reinsured's settlement. Under this wording a reinsurer is obliged to pay a claim which the reinsured has compromised honestly and in a businesslike manner. (*Excess Insurance Co.* v. *Matthews* (1925), 31 Com. Cas. 43.)

The extent of the reinsurer's liability will not exceed the amount payable under the original policy, except in so far as the expenses of handling the claim are recoverable. If it were otherwise, the doctrine of indemnity would not be observed.

TERMINATION OF REINSURANCE

It need hardly be said that if the original policy is determined, the reinsurance also terminates. An alteration of the original policy without the facultative reinsurer's consent would also be sufficient to free the reinsurer from liability. (*Norwich Union Fire Insurance Society* v. *Colonial Mutual Fire Insurance Co.*, [1922] 2 K.B. 461.)

A treaty is usually made for a fixed period or for an indefinite period determinable on notice being given by either party. But

even when a treaty lapses or is cancelled, the reinsurer may, by reason of its terms, remain liable in respect of subsisting insurances until their expiry or renewal date.

STAMP DUTY

A fire reinsurance contract requires a sixpenny stamp

CHAPTER XIII

FIRE BRIGADES

FIRE BRIGADES ACT, 1938

This act consolidated and amended the existing law with regard to fire brigades but, owing to the war, it never became fully operative. The provisions of the Act were based mainly on the recommendations of the Departmental Committee on Fire Brigade Services presided over by Lord Riverdale. Only certain sections of the Act were applied to the London County Council which retained existing powers under the Metropolitan Fire Brigade Act, 1865.

The heavy fire raids on this country in the years 1940 and 1941 compelled the Government to undertake the reorganization and improvement of the local brigades. By the Fire Services (Emergency Provisions) Act, 1941, the Government was enabled to take over the entire control of the public fire-fighting services and personnel and, so far as local authorities were concerned, to take over their appliances during the emergency. In this way the National Fire Service came into existence.

FIRE SERVICES ACT, 1947

The Fire Services Act, 1947, reverts to the system of local brigades but preserves a large measure of central control. Its purpose is to transfer fire-fighting functions from the National Fire Service to fire brigades maintained by the councils of counties and county boroughs. It repeals the whole of the Fire Brigades Act, 1938, and most of the Metropolitan Fire Brigade Act, 1865. The main provisions of the enactment are outlined below.

FIRE AUTHORITIES

From a day[1] to be appointed by the Secretary of State, the council of every county and county borough becomes the fire authority for its area.

Each fire authority has the duty of making provision for fire-fighting purposes, and in particular of securing—

(*a*) the services for its area of such a fire brigade and such equipment as may be necessary to meet efficiently all normal requirements;

(*b*) the efficient training of the members of the fire brigade;

(*c*) efficient arrangements for dealing with calls for the assistance of the fire brigade in case of fire and for summoning members of the fire brigade;

(*d*) efficient arrangements for obtaining, by inspection or otherwise, information required for fire-fighting purposes with respect to

[1] The day has been appointed: England 1st April, 1948; Scotland 1st May, 1948.

the character of the buildings and other property in the area of the fire authority, the available water supplies and the means of access thereto, and other material local circumstances;

(*e*) efficient arrangements for ensuring that reasonable steps are taken to prevent or mitigate damage to property resulting from measures taken in dealing with fires in the area of the fire authority;

(*f*) efficient arrangements for the giving, when requested, of advice in respect of buildings and other property in the area of the fire authority as to fire prevention, restricting the spread of fires and means of escape in case of fire.

RIGHT OF ENTRY FOR INSPECTION

For purposes of the arrangements mentioned in paragraph (*d*) above, any member of a fire brigade maintained in pursuance of the Act shall, if authorized in writing by the fire authority, have the same powers of entering premises as are conferred upon authorized officers of councils by Sect. 287 of the Public Health Act, 1936. The authorized officer will be unable to demand entry to any premises other than a factory, workshop or workplace unless twenty-four hours' notice has been given to the occupier. Moreover, it will be an offence, punishable by fine or imprisonment, for any person carrying out an inspection to disclose any information regarding a manufacturing or trade secret, unless the disclosure is made in the performance of his duty.

CENTRAL FIRE BRIGADES ADVISORY COUNCIL

Provision is made for a Central Fire Brigades Advisory Council to be established by the Secretary of State to assist him in a consultative capacity. He may, after consultation with the Council, make regulations prescribing standards of efficiency with which fire authorities will be required to comply.

ARRANGEMENT FOR MUTUAL ASSISTANCE

It is the duty of fire authorities, so far as practicable, to join in making "reinforcement schemes" for securing mutual assistance in dealing with fires occurring in the areas of the participating authorities where either—

(*a*) it is necessary to supplement the services provided by the authority in whose area the fire occurs, or

(*b*) reinforcements can be more readily obtained from the resources of other participating authorities.

Where no reinforcement scheme has been made, or it appears to the Secretary of State that a scheme is no longer satisfactory, he may make what he considers a suitable scheme for the authorities in question.

A fire authority may enter into arrangements with persons (not being other fire authorities) who maintain fire brigades to secure assistance for dealing with fires occurring within its area where either—

(*a*) it is necessary to supplement the services provided by the authority or

(*b*) reinforcements can more readily be obtained from the resources of the said persons than from the resources of the authority.

SUPPLEMENTARY POWERS OF FIRE AUTHORITIES

A fire authority is also empowered—

(*a*) to provide accommodation for the fire brigade and equipment;

(*b*) to pay rewards to persons, not being members of a brigade maintained in pursuance of the Act, who render services for fire-fighting purposes;

(*c*) subject to certain consents being obtained to provide and maintain fire alarms in any street or public place and to affix any such alarm to any wall or fence adjoining a street or public place;

(*d*) to employ the fire brigade or use equipment outside its area;

(*e*) to employ the fire brigade or use equipment for purposes other than fire-fighting and to charge for such purposes.

METROPOLITAN FIRE BRIGADE ACT, 1865

A fire authority must not make any charge for fire fighting services (except as specifically provided under the various schemes), but the Metropolitan Fire Brigade Act, 1865, still provides that the London Fire Brigade shall be entitled to a levy upon insurance offices to the extent of £35 per £1,000,000 on the gross amounts insured within the metropolis.

By Sect. 29 of the Act of 1865, it is the duty of the brigade to assist the Salvage Corps established by insurance offices and, upon the application of any officer of that force, to hand over to the custody of the corps property that might be saved from fire. The brigade is required to send daily information of fires to insurance offices.

Under local statutes, Liverpool and Salford have also retained anachronistic powers to charge insurance offices extraordinary expenses in attending fires.

COMBINATION OF FIRE AUTHORITIES

Any two or more fire authorities may submit to the Secretary of State for approval a scheme for combining their areas and providing for other matters incidental thereto. If it appears to the Secretary of State that it is expedient in the interests of efficiency that a combination scheme should be made and no satisfactory scheme has been submitted to him by the fire authorities for the areas concerned, he may by order make such a scheme provided that, where the population of a county or county borough is one hundred thousand or more, then, except with the consent of the council, no scheme shall be made for the combination of the county or borough with any area or areas of a fire authority or authorities of which the population or aggregate population exceeds that of the county or borough.

A combination scheme approved or made under the Act may be amended or revoked by a subsequent scheme.

DISCHARGE OF FUNCTIONS THROUGH OTHER FIRE AUTHORITIES OR PERSONS

A fire authority may, with the approval of the Secretary of State, make arrangements with any other fire authority or other person who maintains a fire brigade so as to secure the discharge of all or any of its functions through such other fire authority or person.

SUPPLY OF WATER FOR FIRE-FIGHTING

A fire authority must take all reasonable measures for ensuring the provision of an adequate supply of water and for securing that it will be available for use, in case of fire. No water undertakers shall unreasonably refuse to enter into any agreement proposed by a fire authority to ensure such a supply.

Sects. 32 to 34 of the Third Schedule to the Water Act, 1945 (which require undertakers at the expense of the fire authority to provide hydrants) shall apply to all statutory water undertakers who shall, at the expense of the fire authority, cause the situation of every fire hydrant to be plainly indicated by a notice or distinguishing mark, which may be placed on any wall or fence adjoining a street or public place.

After consultation with the Central Fire Brigades Advisory Council, the Secretary of State may make regulations providing for uniformity in fire hydrants provided by statutory water undertakers and in the notices or marks indicating their situation.

A fire authority shall have power by agreement—

(*a*) to secure the use, in case of fire, of water under the control of any person other than statutory water undertakers;

(*b*) to improve the access to any such water;

(*c*) to lay and maintain pipes and to carry out other works in connection with the use of such water in case of fire.

Subject to any agreement, a fire authority may use for fire-fighting purposes any convenient and suitable supply of water, but shall be liable to pay reasonable compensation for it.

NOTICE OF PROPOSED WORKS AFFECTING WATER SUPPLY AND HYDRANTS

Where a person proposes to carry out works for the purpose of supplying water to any part of the area of a fire authority, prior notice in writing must be given to the authority. Notice is also required of works which affect any fire hydrant.

MANAGEMENT AND ESTABLISHMENT SCHEMES

Every fire authority (other than the London County Council) which is the council of a county is required to set up a fire brigade

committee. Its constitution will be determined by a "management scheme" made by the fire authority with the approval of the Secretary of State.

The establishment of members of a fire brigade and of fire stations and equipment will be determined by an "establishment scheme" made by the fire authority and approved by the Secretary of State.

ADMINISTRATIVE PROVISIONS

The Secretary of State is able to make regulations as to the conditions of service of persons employed as members of fire brigades, their appointment and promotion. He is empowered to lay down standards of training and equipment to secure efficient fire services. Training centres may be established by the Secretary of State as well as by individual fire authorities.

For the purpose of obtaining information as to the manner in which fire authorities are performing their functions, inspectors may be appointed.

Treasury grants may be made to fire authorities, not exceeding twenty-five per cent of the expenditure incurred by them in providing fire services.

POWERS OF FIREMEN AND POLICE AT FIRES

Any member of a fire brigade, maintained in pursuance of the Act, who is on duty, any member of any other fire brigade who is acting in accordance with arrangements made under the Act, or any constable, may enter and if necessary break into any premises or place in which a fire has or is reasonably believed to have broken out, or any premises or place which it is necessary to enter for the purpose of extinguishing a fire or of protecting the premises or place from acts done for fire-fighting purposes, without the consent of the owner or occupier thereof, and may do all such things as he may deem necessary for extinguishing the fire or for protecting from fire, or from acts done as aforesaid, any such premises or place or for rescuing any person or property therein.

Any person who wilfully obstructs or interferes with any member of a fire brigade, who is engaged on operations for fire-fighting, is liable on summary conviction to a fine not exceeding twenty-five pounds.

The senior fire brigade officer present at a fire has sole charge and control of all operations. He may require the water undertakers to provide a greater supply and pressure of water. No liability is incurred if, by reason of compliance with such a requirement, some other person suffers an interruption of the supply of water.

The senior officer of police present at a fire, or in the absence of any officer of police, the senior fire brigade officer present, may close to traffic any street or may stop or regulate the traffic whenever, in his opinion, it is necessary or desirable.

FALSE ALARMS OF FIRE

Any person who knowingly gives or causes to be given a false alarm of fire to any fire brigade maintained in pursuance of the Act or to any member of such a brigade shall be liable on summary conviction to a fine not exceeding twenty-five pounds or to imprisonment for a term not exceeding three months, or both fine and imprisonment.

TRANSITIONAL PROVISIONS

The Act contains a number of transitional provisions dealing with the transfer of the personnel and property of the National Fire Service, the pension rights of members of fire brigades, compensation for loss of emoluments or employment and the position of police-firemen. For the future no member of a police force will be employed as a member of a fire brigade.

The Act applies to Scotland, subject to a number of adaptations laid down in Sect. 36.

APPENDIX A

FORM OF STANDARD POLICY

INSURANCE COMPANY LIMITED

IN CONSIDERATION of the insured named in the Schedule hereto paying to the INSURANCE COMPANY LIMITED (hereinafter called the Company) the First Premium mentioned in the said Schedule

THE COMPANY AGREES (subject to the Conditions contained herein or endorsed or otherwise expressed hereon which Conditions shall so far as the nature of them respectively will permit be deemed to be Conditions precedent to the right of the Insured to recover hereunder) that if after payment of the premium the Property Insured described in the said Schedule, or any part of such Property, be destroyed or damaged by

(1) Fire (whether resulting from explosion or otherwise) not occasioned by or happening through
  (*a*) Its own spontaneous fermentation or heating or its undergoing any process involving the application of heat,
  (*b*) Earthquake, Subterranean Fire, Riot, Civil Commotion, War, Invasion, Act of Foreign Enemy, Hostilities (whether War be declared or not), Civil War, Rebellion, Revolution, Insurrection or Military or Usurped Power;
(2) Lightning;
(3) Explosion, not occasioned by or happening through any of the perils specified in 1 (*b*) above,
  (i) Of Boilers used for domestic purposes only,
  (ii) In a building not being part of any Gas Works, of Gas used for domestic purposes or used for lighting or heating the building;

at any time before 4 o'clock in the afternoon of the last day of the period of insurance named in the said Schedule or of any subsequent period in respect of which the Insured shall have paid and the Company shall have accepted the premium required for the renewal of this policy, the Company will pay to the Insured the value of the Property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such Property or any part thereof

PROVIDED THAT the liability of the Company shall in no case exceed in respect of each item the sum expressed in the said Schedule to be insured thereon or in the whole the total sum insured hereby, or such other sum or sums as may be substituted therefor by memorandum hereon or attached hereto signed by or on behalf of the Company.

SCHEDULE

The Insured			Policy No.
Agency	Period of Insurance From To at Four o'clock in the afternoon.	Annual Premium	First Premium

Description of Property Insured	Sum Insured £
N.B.—Unless otherwise stated the buildings herein referred to are constructed of brick, stone or concrete, and roofed with slates, tiles, metal, concrete or asphalte.	

IN WITNESS WHEREOF, this Policy has been signed for and on behalf of the Company this

Examined.....

.....

CONDITIONS

1. This Policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular.

2. This Policy shall be avoided with respect to any item thereof in regard to which there be any alteration after the commencement of this insurance.

(1) by removal
or (2) whereby the risk of destruction or damage is increased
or (3) whereby the Insured's interest ceases except by Will or operation of law, unless such alteration be admitted by memorandum signed by or on behalf of the Company.

3. This Policy does not cover

(*a*) Destruction or damage by explosion (whether the explosion be occasioned by fire or otherwise). } except as stated on the face of this Policy.

(*b*) Goods held in trust or on commission, money, securities, stamps, documents, manuscripts, business books, patterns, models, moulds, plans, designs, explosives. } unless specially mentioned as insured by this Policy.

(*c*) Destruction of or damage to property which, at the time of the happening of such destruction or damage, is insured by, or would, but for the existence of this Policy, be insured by any Marine Policy or Policies, except in respect of any excess beyond the amount which would have been payable under the Marine Policy or Policies had this insurance not been effected.

4. On the happening of any destruction or damage the Insured shall forthwith give notice thereof in writing to the Company and shall within 30 days after such destruction or damage, or such further time as the Company may in writing allow, at his own expense deliver to the Company a claim in writing containing as particular an account as may be reasonably practicable of the several articles or portions of property destroyed or damaged and of the amount of destruction or damage thereto respectively having regard to their value at the time of the destruction or damage together with details of any other Insurances on any property hereby insured. The Insured shall also give to the Company all such proofs and information with respect to the claim as may reasonably be required together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. No claim under this Policy shall be payable unless the terms of this condition have been complied with.

5. If the claim be in any respect fraudulent or if any fraudulent means or devices be used by the Insured or anyone acting on his behalf to obtain any benefit under this Policy or if any destruction or damage be occasioned by the wilful act or with the connivance of the Insured all benefit under this Policy shall be forfeited.

6. If the Company elect or become bound to reinstate or replace any property the Insured shall at his own expense produce and give to the Company all such plans, documents, books and information as the Company may reasonably require. The Company shall not be bound to reinstate exactly or completely, but only as circumstances permit and in reasonably sufficient manner and shall not in any case be bound to expend in respect of any one of the items insured more than the sum insured thereon.

7. On the happening of any destruction or damage in respect of which a claim is or may be made under this Policy the Company and every person authorized by the Company may, without thereby incurring any liability and without diminishing the right of the Company to rely upon any conditions of this Policy, enter, take or keep possession of the building or premises where the destruction or damage has happened, and may take possession of or require to be delivered to them any of the property hereby insured and may keep possession of and deal with such property for all reasonable purposes and in any reasonable manner. This Condition shall be evidence of the leave and licence of the Insured to the Company so to do. If the Insured or anyone acting on his behalf shall not comply with the requirements of the Company or shall hinder or obstruct the Company in doing any of the above mentioned acts, then all benefit under this Policy shall be forfeited. The Insured shall not in any case be entitled to abandon any property to the Company whether taken possession of by the Company or not.

8. If at the time of any destruction of or damage to any property hereby insured there be any other Insurance effected by or on behalf of the Insured covering any of the property destroyed or damaged, the liability of the Company hereunder shall be limited to its ratable proportion of such destruction or damage.

If any such other Insurance shall be subject to any Condition of Average this Policy, if not already subject to any Condition of Average, shall be subject to Average in like manner.

If any other Insurance effected by or on behalf of the Insured is expressed to cover any of the property hereby insured, but is subject to any provision whereby it is excluded from ranking concurrently with this Policy either in whole or in part or from contributing ratably to the destruction or damage, the liability of the Company hereunder shall be limited to such proportion of the destruction or damage as the sum hereby insured bears to the value of the property.

9. Any claimant under this Policy shall at the request and at the expense of the Company do and concur in doing and permit to be done all such acts and things as may be necessary or reasonably required by the Company for the purpose of enforcing any rights and remedies, or of obtaining relief or indemnity from other parties to which the Company shall be or would become entitled or subrogated upon its paying for or making good any destruction or damage under this Policy, whether such acts and things shall be or become necessary or required before or after his indemnification by the Company.

10. Every Warranty to which the property insured or any item thereof is, or may be, made subject, shall from the time the Warranty attaches apply and continue to be in force during the whole currency of this Policy, and non-compliance with any such Warranty, whether it increases the risk or not, shall be a bar to any claim in respect of such property or item; provided that whenever this Policy

is renewed a claim in respect of destruction or damage occurring during the renewal period shall not be barred by reason of a Warranty not having been complied with at any time before the commencement of such period.

11. All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators, one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or, in case the Arbitrators do not agree, of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings, and the making of an Award shall be a condition precedent to any right of action against the Company. After the expiration of one year after any destruction or damage the Company shall not be liable in respect of any claim therefor unless such claim shall in the meantime have been referred to arbitration.

Memorandum. If at the time of destruction or damage to any building hereby insured the Insured shall have contracted to sell his interest in such building and the purchase shall not have been but shall be thereafter completed, the purchaser on the completion of the purchase, if and so far as the property is not otherwise insured by or on behalf of the purchaser against such destruction or damage, shall be entitled to the benefit of this Policy so far as it relates to such destruction or damage without prejudice to the rights and liabilities of the Insured or the Company under this Policy up to the date of completion.

(The Fire Offices' Committee has kindly given permission for this policy to be included.)

APPENDIX B

LAW CASES

Agency

Newsholme Bros. *v.* Road Transport and General Insurance Company, Ltd.

(1929), 45 T.L.R. 573

The appellant insurance company supplied proposal forms to their agent who, though in possession of the true answers given to him verbally by a partner of Newsholme Bros., wrote on a proposal form incorrect answers. The partner signed the form and the company issued a policy incorporating the written proposal. The company sought to repudiate the policy on the ground of misrepresentation.

Held by the Court of Appeal that the agent was acting as agent for the proposer in filling in the proposal which was the basis of the contract. The insurance company had no liability.

Scrutton L. J. said: ". . . In my view the important question for the decision of this case is whether the knowledge of the agent acquired in filling up the proposal for the assured is to be taken as the knowledge of the company. If the person having authority to bind the company by making a contract in fact knows of the untruth of the statements and yet takes the premium, the question may be different. Even then I see great difficulty in avoiding the effect of the writing signed by the proposer that the truth of the statements is the basis of the contract. . . . In my view the decision in *Bawden's case* is not applicable to a case where the agent himself at the request of the proposer fills up the answers in purported conformity with the information supplied by the proposer. If the answers are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue, but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true and are the basis of the contract, can escape from the consequences of his negligence by saying that the person whom he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

Alteration

Pim *v.* Reid

(1843), 6 M. & G. 1

The policy was on a paper machine, engines and machinery in a paper mill, but the insured began the cleaning and dyeing of cotton waste which was a more hazardous process, and a fire occurred. There was no condition in the policy prohibiting the change in the use to which the premises were put, and the court decided that the loss was one for which the insurance company must pay.

Maule, J., said: "In the first place it has been contended that independently of the express provisions, if at any time after the insurance is effected a hazardous trade is carried on, or goods of a hazardous description are deposited on the premises, the policy is void. But I do not conceive the law to be so. Apart from fraud the insurance company must pay for any loss or damage to the goods insured notwithstanding any variation of circumstances' unless in the conditions upon which they agree to insure, they choose to provide for it."

Arbitration

Jureidini *v.* National British and Irish Millers' Insurance Co., Ltd.

[1915] A.C. 499

The plaintiff had effected a fire policy on stock-in-trade. When a fire occurred to the stock, the defendants repudiated liability on the grounds of arson and fraud. The plaintiff sued the defendants, who then contended that the matter was not one for the court as the policy contained an arbitration clause, compliance with which was a condition precedent to any right of action on the policy.

Darling, J., held that the claim was not fraudulent and gave judgment in favour of the plaintiff. The Court of Appeal, however, decided that no action was maintainable until there had been an arbitration. When the case came before the House of Lords, the judgment of Darling, J., was restored. The defendants, in repudiating liability on grounds going to the root of the contract and thus, in effect, repudiating the contract, were not entitled to the benefit of one of its terms, viz. the arbitration clause.

Arbitration

Metal Products Co. *v.* Phœnix Assurance Co., Ltd.

(1925), 23 Ll. L.L.R. 87, C.A.

The plaintiffs' property, which was destroyed by fire, was insured under a standard policy. Besides containing a wide arbitration clause, it provided: "This policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular." The insurance company did not accept the insured's values and, furthermore, contended that there had been non-disclosure of material facts. On receiving a letter from the company's assessors stating that the insurers were not prepared to admit liability, the insured commenced this action, their argument being that as the insurers were virtually avoiding the contract, the arbitration clause was inoperative.

The court of first instance, as well as the Court of Appeal, decided that the insurers had not repudiated the contract but were basing their attitude on the terms of the policy. The right to have the dispute submitted to arbitration, therefore, remained open to them.

Bankes, L.J., said: "In a case like this it seems that the question in issue between the parties must be decided upon the attitude which was taken up by the insurance company in reference to the claim; and the authorities indicate that an insurance company may take up one of two attitudes in reference to the claim. The insurance company may repudiate the contract as a whole upon the ground that, having regard to the terms and conditions of the policy, and the conduct of

the plaintiff, they claim that they have the right to repudiate, and that they do repudiate the contract as a whole, and if that is the attitude taken up by the insurance company the case of *Jureidini* v. *National British and Irish Millers' Insurance Co., Ltd.* (1915), has decided that, having repudiated the contract as a whole, the insurance company are not entitled to rely upon a condition in the repudiated contract that the parties making the claim must go to arbitration. That is one class of case.

"The other class of case is that the insurance company, when a claim is made, may indicate what their defence to the claim is, and may either claim arbitration themselves or challenge the claimant to go to arbitration; if that is the attitude taken up by the insurance company I think the authorities show that it is not a repudiation of the contract as a whole, but it is an indication of the case which the insurance company intend to raise before the arbitrator, and claiming themselves arbitration or suggesting that the claimant's only remedy is by arbitration. Now in every case, the question has to be decided partly by reference to the terms of the policy itself, and partly by this attitude taken up by the insurance company.

"Now this case is peculiar in my experience to this extent because I do not remember having seen a clause in reference to misrepresentation, misdescription, or non-disclosure which is worded as this particular policy is. The first condition provides that 'This policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure,' which is giving the insurance company an election as to whether they will, or will not, avoid the policy, and in the case of a policy with the condition expressed in that form it seems to me easier for the insurance company to take up the position of the second class and to indicate what their defence is, and, without repudiating the contract as a whole, make it plain that the defence which they are setting up is one which must be decided, and can only be decided, by arbitration. So much for the wording of this particular policy and the construction to be put upon it.

"Then, having regard to the form of that condition, I think this letter of the 26th June, 1925, which is relied upon as a repudiation of the contract as a whole, ought not to be so read; it seems to me carefully drawn to protect the position of the insurance company in reference to their right to go to arbitration. The dispute between the parties up to this point seems to have been on a question of the value of the goods. The assessors who write the letter say, in the first place, that the difference in values is so great as to make any further attempts to adjust the loss useless, and then they go on to say: 'We are requested to add that, apart from any question of values, as the result of investigations which they have made, our clients find that your clients, when negotiating for the insurance, failed to disclose material information,' then they set out what the information is, and then, as it seems to me, they carefully refrain from saying: 'under those circumstances our clients elect to avoid the policy'; all they say is: 'our clients are not, therefore, prepared to admit liability.' It seems to me under those circumstances, having regard to the form of policy, that that is an indication to the persons to whom the letter is written that if you wish to establish our liability you must proceed in accordance with the contract."

Assignment

Sadlers' Co. *v.* **Badcock**

(1743), 2 Atk. 554

The policy in this case covered the lessee of a house for a period of seven years, the insurers' undertaking being "to pay £400 to her, her executors, administrators and assigns so often as the house shall be burned within the said term." The lessee parted with her interest in the house which was then destroyed by fire. After the loss the policy was assigned to the person who had acquired the lease and an attempt made to recover the amount of the loss.

Lord Hardwicke held that the policy was a contract to indemnify the original holder against loss to the extent of £400, and as she had not sustained a loss, the insurers were not liable.

Average

Acme Wood Flooring Co. *v.* **Marten**

(1904), 90 L.T. 313

The plaintiffs had a policy with Lloyd's underwriters (one of whom was the defendant), insuring timber for an amount of £11,450. It was stated to be "subject to average," but no average clause was attached. There were also more specific insurances with four companies, the sums insured amounting to £30,500.

A fire occurred and it was found that the total value of the property at risk was £36,500. The damage was assessed at £12,850 and a dispute arose as to the amount for which the Lloyd's underwriters were liable. Lloyd's considered that their responsibility was limited to

$$\frac{11,450}{36,500} \times £12,850 = £4,031 \text{ os. } 6\text{d.}$$

The plaintiffs argued that in applying average the companies' policies should be taken into account and that, as the insurances with Lloyd's and the companies totalled £41,950, which was in excess of the value of the property, the liability of the Lloyd's underwriters should not be reduced.

It was held that "subject to average" meant "subject to the average clause usually attached to Lloyd's policies, viz.: "Whenever a sum insured is declared to be subject to average, if the property covered thereby shall, at the breaking out of any fire, be collectively of greater value than such sum insured, then the assured shall be considered as being his own insurer for the difference and shall bear a rateable share of the loss accordingly." The expression "property covered thereby" referred to the property covered by Lloyd's policy. The underwriters were correct in applying average in the manner already indicated and judgment was given for the defendant.

Construction

Robertson *v.* **French**

(1803), 4 East, 130

Lord Ellenborough, C.J., said: ". . . the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, namely, that it is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in

their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning and that the words super-added in writing (subject, indeed, always to being governed in point of construction by the language and terms with which they are accompanied) are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula, adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."

Contribution

American Surety Co. *v.* Wrightson

(1910), 16 Com. Cas. 37

An insurance against loss through dishonesty of employees covered the defalcations of an individual up to the amount of $2500. The insurers paid this amount for a loss totalling $2680 and then claimed contribution from the insurers under another policy which covered loss from fire, burglary, and dishonesty of employees and others in one undivided sum of $40,000.

The claim was based upon the relative sums insured, but the court preferred an apportionment on the relative amounts which would have been paid for the loss under each policy in the absence of any other policy, i.e. $\frac{2500}{5180}$ and $\frac{2680}{5180}$.

Hamilton, J., said: "It appears to me that the problem of discovering some terms which can be rateably compared with one another between two policies so widely different as these is one that differentiates it so much from the simple rule of double insurance—namely, same interest, same assured, same adventure, same risk and different amounts—as to make any consideration drawn from those hardly applicable at all, and make it desirable to leave open the question whether anything that can be called contribution in the nature of double insurance arises in such a case as this."

Contribution

Scottish Amicable Heritable Securities Association *v.* Northern Assurance Co.

(1883), 11 R. (Court of Sess.) 287

The plaintiffs had policies with four companies, including the Northern, on property in which they were interested as first mortgagees. Insurances were also in force with three other companies, but these

were to protect the second mortgagees. When a fire occurred, resulting in a loss within the plaintiffs' policies, their insurers claimed that the insurances of the second mortgagees should be brought into contribution.

It was held that the plaintiffs were entitled to recover the full amount from their own insurers and that the second mortgagees' insurers could not be brought into contribution because they insured a different interest.

(See also under *Indemnity—Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas. 699.)

Contribution

North British and Mercantile Insurance Co. *v.* **Liverpool and London and Globe Insurance Co.**

(1877), 5 Ch. D. 569

King and Queen Granaries case

Barnett & Co., wharfingers, sold grain to Rodocanachi & Co. but as it remained in their granary they accepted responsibility for it in accordance with the custom of the trade. Accordingly they insured it against fire with the Liverpool and London and Globe. Rodocanachi & Co. also covered the grain but with the North British.

A quantity of the grain was destroyed by fire and the insurers jointly agreed to pay the loss in full. This action was then commenced to decide the ultimate liabilities of the two insurers.

It was held that there was no contribution as this was not a case of double insurance. Each insurance company insured a separate interest. The North British, on paying the loss to Rodocanachi & Co., would be entitled to be subrogated to the rights of their insured against Barnett & Co. In turn Barnett & Co. would be entitled to indemnity from the Liverpool and London and Globe, who would have to bear the whole of the loss.

Mellish, L.J., said: ". . . I see no reason why the principles in respect of contribution should not be exactly the same in respect of fire policies as they are in respect of marine policies, and I think if the same person in respect of the same right insures in different offices there is no reason why they should not contribute in equal proportions in respect of a fire policy as they would in respect of a marine policy. The rule is perfectly established in the case of a marine policy that contribution only applies when it is an insurance by the same person having the same rights, and does not apply where different persons insure in respect of different rights. . . ."

Double Insurance

Equitable Fire and Life *v.* **Ching Wo Hong**

[1907] A.C. 96

A policy issued by the Equitable Fire, insuring stock-in-trade, contained a condition that additional insurance must not apply without the company's consent. The insured arranged for additional insurance with another company, but it was not to come into force until the premium had been paid. A fire occurred and the Equitable Fire contended there was double insurance. It was held that, as the second policy was inoperative, there never was double insurance.

Ex Gratia Payments

Taunton *v.* Royal Insurance Co.

(1864), 2 H. & M. 135

A vessel, the *Lottie Sleigh*, whilst lying in the river Mersey caught fire, with the result that some gunpowder on board exploded, breaking a number of windows in the district. The Royal received claims under various policies and although they contained the usual exception against explosion, the company made payments *ex gratia*. A shareholder, named Taunton, asked the court for an injunction to restrain the company from making payments for which it was not liable.

It was held that the directors were entitled to make the payments *ex gratia*, such payments being likened to advertising expenditure.

Fire

Stanley *v.* Western Insurance Co.

(1868), L.R. 3 Ex. 71

The insured's business was the extraction of oil from shoddy. A leakage occurred in the pipe of a still and inflammable gas, which escaped, took fire, caused some damage, and then exploded, blowing up the building, when the fire became general.

The policy excluded loss or damage by explosion except such as should arise from explosion by gas. The plaintiff contended that all the damage was caused by the original fire, and that the exclusion of loss or damage by explosion did not apply because the explosion in this case was by gas.

It was held, however, that the insurers were liable only for the damage caused by the original fire and not for that resulting from explosion. The word "gas" in the policy must be construed according to its ordinary and popular sense, and the meaning according to this sense was illuminating gas.

The court also decided that "any loss resulting from an apparently necessary and *bona fide* effort to put out a fire, whether it be by spoiling the goods by water, or throwing articles of furniture out of the window, or even the destroying of a neighbour's house by an explosion for the purpose of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the policy."

Fire

Levy *v.* Baillie

(1831), 7 Bing. 349

The plaintiff, an upholsterer, claimed £1000 for goods stolen and £85 for goods damaged during removal of the property from premises exposed to a fire. The jury awarded only £500 and the insurers then asked for a new trial, contending that the plaintiff's original overvaluation was evidence of fraud. A new trial was allowed on this ground but no objection was taken to the claim because the property was not actually burnt but was mainly stolen.

Fire

Austin *v.* Drew

(1815), 4 Camp. 360

The claim was for damage to sugar caused by smoke and heat from

the fire used in refining. The insured's servant had negligently omitted to open a register, with the consequence that the heat became excessive, but nothing had ignited which ought not to have been burning. The insurance company contended there had been no fire within the meaning of the policy.

In giving judgment against the plaintiff Gibbs, C.J., said: "There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire. The plaintiff's loss arose from the negligent mismanagement of their machinery. The sugars were chiefly damaged by the heat; and what produced that heat? Not any fire against which the company insures, but the fire for heating the pans which continued all the time to burn without any excess . . . there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue and anything been burnt, the company would have been liable, but can this be when the fire never was at all excessive and was always confined to its proper limits? This is not a fire within the meaning of the policy, nor a loss for which the company undertake. They might as well be sued for the damage done to a drawing-room by a smoky chimney."

The Chief Justice made it clear that if the damage had been due to a fire which had escaped from the flue, the negligence of the insured's employees would have been no defence to a claim against the insurance company. "If there is a fire, it is no answer that it was occasioned by the negligence or misconduct of servants. . . ."

Fire

Ahmedbhoy Habbibhoy *v.* Bombay Fire and Marine Insurance Co.

(1912), 107 L.T. 668, P.C.

The appellant was the owner of a cotton mill which was insured against fire. In October, 1906, a fire occurred and the insurers were notified. They decided to take possession of the mill for salvage purposes. Subsequently the appellant was given back possession and, when his claim was formulated, the matter was referred to arbitration. The appellant sought to show that the insurers were liable for damage caused to the machinery by water and that the damage had been increased by the length of time during which the water had been left on the machinery. The insurers' contention was that their liability ceased the moment the fire was extinguished.

The case came before the Privy Council which held that any damage arising whilst the insurers were in possession was their responsibility. "When the company has thus taken possession of the premises and done what, in their opinion, was wisest to minimize the damage, they cannot say that the actual damage is not the natural and direct consequence of the fire."

Fire

Johnston *v.* West of Scotland Insurance Co.

(1828), 7 S. 52

A house in Glasgow was destroyed by fire and the Dean of Guild gave instructions that the gable wall, which was in a dangerous condition, should be demolished. In the course of the demolition, it fell

and damaged a house on the opposite side of the street, the owner of which had insured it with the West of Scotland. It was held that the loss was within the policy.

Lord Meadowcroft said: "The Lord Ordinary is quite clear that in all questions of this kind fire must be the proximate cause of the injury received. But he is not aware of there being any case in which it has been held that, in order to entitle the assured to their relief, it should be proved to have been the actual instrument by which the injury sustained was inflicted. Thus if furniture is destroyed not by the fire itself but by water thrown in to extinguish it, or if a mirror should be broken from a stone loosened from the building by the flames, such losses the Lord Ordinary has understood are universally admitted to be covered by a policy of insurance against fire. Neither has it ever been understood that the fire doing the injury should actually have arisen or been in the premises insured; for if from the reflection of the conflagration in a narrow street damage has been occasioned to the tenements opposite to those on fire it is believed it never was disputed that the proprietors of those tenements if insured were entitled to recover. Now in this case it is settled in point of fact that the wall which created the damage fell in consequence of the injury it had sustained by the fire, and, therefore, although the wall was the instrument by which the damage was occasioned, the fire was the proximate cause of the injury."

Good Faith

Re **Yager** *v.* **Guardian Assurance Co.**

(1912), 29 T.L.R. 53

The plaintiff had an insurance with the Liverpool and London and Globe for £2000, renewable at Michaelmas, 1910. On the 25th August, 1910, he effected temporary additional cover for £1600 with the Guardian and arranged that when the policy with the Liverpool and London and Globe expired he would insure to the extent of £3600 with the Guardian. A cover note for £1600 was issued to him on the 21st September and subsequently a policy was prepared for £3600, with a stipulation that it was not to come into force until the premium had been paid. Before the premium had been paid, the Liverpool and London and Globe informed the plaintiff that they were not willing to continue their insurance, but this fact was not communicated by the plaintiff to the Guardian.

It was held that the declinature was a material fact which ought to have been disclosed as the policy for £3600 was not intended to be binding upon the Guardian until the premium had been paid.

Good Faith

Bufe *v.* **Turner**

(1815), 6 Taunt. 338

A fire occurred in a boat-builder's workshop in Heligoland and after it appeared to be extinguished the owner of an adjacent warehouse sent a special messenger to insure his premises, but failed to disclose the fact that a fire had occurred near by. The fire broke out again two days later and spread to the warehouse. The owner's claim was repudiated by the insurers on the grounds of non-disclosure of material fact. Judgment was given for the insurers.

Good Faith

Carter *v.* **Boehm**

(1766), 3 Burr. 1905

In the course of his judgment, Lord Mansfield said: "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist.

"The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run, at the time of the agreement.

"The policy would be equally void, against the underwriter if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived; and an action would lie to recover the premium.

"The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary.

"But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. . . . There are many matters as to which the insured may be innocently silent. He need not mention what the underwriter knows. . . . An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew; what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter needs not to be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation. . . ."

Indemnity

Westminster Fire Office *v.* **Glasgow Provident Investment Society**

(1888), 13 App. Cas. 699

The Glasgow Provident Investment Society were the second mortgagees mentioned in *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Co.* (*vide* p. 97). The money which the Scottish Amicable had obtained as a full indemnity had not been spent in reinstatement, but had been applied in reduction of the mortgage. In this action the second mortgagees claimed the full amount of the loss from their insurers and, since the insurances of the first mortgagees were no concern of theirs, they were held entitled to the amount claimed.

Lord MacLaren said: "It is said that it is a universal proposition in the law of insurance that no more can be recovered in the aggregate by the different persons or interests assured than the amount of the fire damage. This is the defenders' proposition, but it is not shown

that it has been received into our law, and I see strong objections to its reception. There is a rule of law of a more limited nature that an assured person can in no case recover more than an indemnity for his individual loss. The rule is founded on obvious considerations of public utility and safety, and it is but another expression for the proposition that the assured must have an insurable interest to the extent of the sum which he recovers. But the conclusion drawn from this expression, namely that the aggregate of all the sums which may be recovered under policies insuring different interests cannot exceed the value of the subjects is, I think, an erroneous generalization, and one which, if acted on, must lead to very inequitable results. The proposition only holds true when the indemnity is given by reinstating, because this is a specific performance, and is an indivisible act, the benefit of which accrues to every holder of an interest in the subjects whether he is insured against fire or not. But when compensation is made in money by the different companies for the benefit of the interests which they have respectively insured, each of the assured creditors or owners settles his claim with his underwriters on such terms as may be agreed on, and nothing is more likely than that the sum of all the separate payments under such agreements should exceed the amount of the fire damage. This is, in fact, a very disadvantageous mode of settlement for the insurance company: but it is not in my view inequitable or unfair, because it is always to be remembered that each of the companies receives in premiums the full equivalent for risks which they respectively undertake, and the actuarial value of each insurance is in no way altered by the circumstances that other insurances have been effected for different interests. The more economical arrangement for the companies obviously is that they should reinstate and this they can always do by agreement amongst themselves, because the election to reinstate lies with the companies. If the insurance companies do not reinstate, each pecuniary claim by a bond-holder or interested party must, in my opinion, be settled just as if no other person had insured his interest in these subjects."

Indemnity

Vance *v.* **Forster**

(1841), Ir. Circ. R. 47

In this case which involved *inter alia* damage to machinery, Pennefather, B., said: "What the jury have to inquire is what is the actual damage sustained by the plaintiff on the subjects of insurance in consequence of the fire. They are to take into account the state of the machinery at the time the fire happened. They are to endeavour to ascertain that state by the examination of witnesses; by a consideration of the first cost and by the state of repair in which the machinery was kept, and was immediately before the fire. It is said, on the one hand, that it is not unfair to go pretty near to the actual cost of new machinery, and on the other side, it is contended that a certain rateable deduction ought to be made from the price of new machinery. . . . These are not, to my mind, the tests by which the plaintiff's loss should be estimated. It is impossible to lay down a general rule that one-third or one-fourth or one-half should be deducted from the original price of new machinery, because that would be excluding from the consideration of the jury the actual state or serviceable order of the machinery

at the time of the fire; but the jury are to say what state of repair the machinery was in, what it would cost to replace that machinery by new machinery, taking into account the entire expense of replacing such new machinery, and how much better (if at all) the mill would be with the new machinery than it was at the time of the fire, and the difference is to be deducted from the entire expense of placing there such new machinery. . . . I think the plaintiff must be borne harmless from his actual loss and, therefore, allowance should be made for transporting the machinery—for putting it up and replacing it *in statu quo*."

Indemnity

Castellain *v.* Preston

(1883), 11 Q.B.D. 386

The defendants owned buildings which were insured against fire with the Liverpool and London and Globe Insurance Company. They contracted to sell the property to Messrs. Rayner who signed the contract and paid a deposit. Subsequently—but before the property had been conveyed—a fire caused damage to the extent of £300. The defendants did not inform the insurance company of the contract of sale, but claimed and were paid the amount of the damage. In due course the conveyance was executed, and the defendants received the full purchase price. When all the facts became known to the insurance company, an endeavour was made to recover the insurance money on the grounds that no loss had been suffered by the defendants. The matter was taken by Castellain, as representative of the company, to the Court of Appeal where it was held that the money must be repaid.

In his judgment Brett, L.J., said: "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it—that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity—that proposition must certainly be wrong."

Insurable Interest

Macaura *v.* Northern Assurance Co.

[1925] A.C. 619

Macaura owned the Killymoon estate and in December, 1919, sold to a company the timber on the estate for £42,000, receiving the price in 42,000 fully-paid £1 shares. The company had practically no assets other than the timber which it proceeded to fell with money advanced by Macaura. He and his nominees were the only shareholders and consequently he had control of the company. By depositing the title-deeds of the estate with the Bank of Ireland he obtained an overdraft. Macaura and the Bank then effected policies with the Northern Assurance Co. in their joint names for their respective interests in the felled timber. In 1922 a fire occurred and most of the timber was destroyed.

It was held that Macaura, as shareholder and creditor of the company, had no insurable interest in the timber.

Liability for Fire

Powell *v.* **Fall**

(1880), 5 Q.B.D. 597, C.A.

A traction engine, which was constructed in accordance with statutory requirements, and which was being driven without negligence, emitted sparks, causing fire to a haystack on a farm by the side of the highway. It was held that the owners or the engine were liable for the damage on the ground that the traction engine was a dangerous machine.

In the course of his judgment Bramwell, L.J., said: "It is just and reasonable that if a person uses a dangerous machine he should pay for the damage which it occasions. If the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable the owner ought to pay compensation for the damage."

Owners of the Steamship Pass of Ballater *v.* **Cardiff Channel Dry Docks and Pontoon Co., Ltd.**

[1942] 2 All E.R. 79

A spark from an oxy-acetelene burner being used by employees of the defendants caused an explosion resulting in severe damage to the plaintiffs' ship. It was found as a fact that the copperdam had not, on the date of the explosion, been certified as gas-free.

In giving judgment for the plaintiffs, Langton, J., said: ". . . where the act which had to be performed necessitated the bringing of fire on to the premises, the standard of reasonable precautions is of necessity exceedingly high. I would go so far as to say that in a case of the present class no precaution which was commercially practicable ought to have been omitted, and any omission of a practicable precaution would constitute a failure of duty. . . ."

Personal Contract

Rayner *v.* **Preston**

(1881), 18 Ch. D. 1

This case arose out of the same circumstances as *Castellain* v. *Preston* (1883). The plaintiffs were the purchasers who, after the fire had occurred, executed the conveyance and paid the purchase price without any deduction on account of the damage. In this action they sought to recover from the vendors the amount which they had received from their insurance company or to establish their right to have the money expended in reinstatement.

It was held that the plaintiffs could not claim the benefit of the insurance in the name of the defendants. The policy was of a personal nature between the defendants and the insurers, and did not extend to protect the plaintiffs' interest.

Brett, L.J., said: "The contract of insurance is a mere personal contract. It is not a contract which runs with the land. . . . It is a mere personal contract and, unless it is assigned, no suit or action can be maintained upon it except between the original parties to it."

Proximate Cause

Re Hooley Hill Rubber and Chemical Co. and Royal Insurance Co., Ltd.

[1920] 1 K.B. 257, C.A.

The insured's policies with the Royal and other companies excluded loss or damage by explosion except loss or damage caused by explosion of illuminating gas elsewhere than on premises in which gas is manufactured or stored. The Royal policy also stated: "This policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused directly thereby or was not the result thereof."

A fire caused considerable damage before an explosion of T.N.T. destroyed the buildings. The insurers admitted liability for the damage by fire prior to the explosion but declined to pay for the loss consequent upon the explosion. The insured's argument was that the explosion was merely an incident in the course of the fire and proximately caused thereby.

It was held, however, that the companies were not liable for the damage caused by the explosion.

Proximate Cause

Everett *v.* London Assurance

(1865), 19 C.B. (N.S.) 126

The policy covered "such loss or damage as should or might be occasioned by fire." There was no exclusion relating to explosion.

On the 1st October, 1864, an accident occurred on board a barge, loading gunpowder. The gunpowder magazine blew up and caused damage by concussion to buildings at a distance. It was contended by the plaintiff that an explosion was really a very rapid fire and, as such, was covered by the policy. This view was rejected and judgment was given for the defendants.

Willis, J., said: "We are bound to look to the immediate cause of the loss or damage and not to some remote or speculative cause. Speaking of the injury, no person would say that it was occasioned by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere. It would be going into the cause of causes to say that this was an injury caused by fire to the property insured. The rule '*In jure non remota causa sed proxima spectatur*,' (in law, the immediate not the remote cause of any event is regarded) determines this case."

Proximate Cause

Tootal Broadhurst Lee Co., Ltd. *v.* London and Lancashire Fire Insurance Co.

(1908), Welford and Otter-Barry, 3rd Edition, 498

The plaintiffs' property was insured with the defendants under policies which excluded loss or damage by fire occasioned by or through any earthquake. On the 14th January, 1907—the day of the Jamaica earthquake—fire broke out at the plaintiffs' premises. It had spread from a building occupied by Curphey situate 87 King Street, Kingston, where the fire broke out at approximately the time of the earthquake. The court held that the original fire at Curphey's premises was set in

operation by earthquake, that it spread by an unbroken chain of causation to 87 King Street, and that the exceptions against earthquake applied.

From the summing-up by Bigham, J., the following extract is taken: "If you find that the fire at Curphey's place was set in operation by the earthquake and then spread by natural causes without the intervention of any other cause, that is, spread by wind or by one thing catching fire from another, and so on—that is what I call natural causes—and then spread, without the intervention of any other cause, to the plaintiffs' goods then your verdict must be for the defendants. If, however, somebody took a burning firebrand out of Curphey's place which had been lit by the conflagration in Curphey's, and then walked into the plaintiffs' place and threw the firebrand into the plaintiffs' place, that could not be called an earthquake fire. Finally, you must remember that this is what is called an exception in the policy, and it is for the defendants to satisfy you that the exception has arisen which excuses them. They must not leave your minds in any reasonable doubt about it, because if they do that, they have not discharged the burden which is upon them."

Renewal

Law Accident Insurance Society, Ltd. *v.* Boyd and Another

[1942] S.L.T. 207

The Law Accident Insurance Society, Limited, successfully sought a declarator that they were entitled by the terms of Sect. 10 (3) of the Road Traffic Act, 1934, to avoid a policy of motor insurance on the grounds of failure to intimate a prosecution for a driving offence occurring *after* conclusion of the policy but *before* renewal for the period of insurance during which an accident occurred.

The policy stated "whereas the Insured has applied for the insurance hereinafter contained and has paid or agreed to pay the premium stated in the schedule as consideration in respect of accident, etc., occurring during the period of the insurance stated in the schedule, or during any period for which the Society may accept payment for a renewal of this policy. . . ." The period stated in the schedule was one year.

In the Second Division The Lord Justice-Clerk in the course of his judgment, said: "As a matter of construction of the policy, which is the written record of the contract of insurance, I suggest to your Lordships that there is no doubt that this (like most motor-accident policies) was a contract of insurance which only persisted for a year at a time and which required by means of a new contract between the parties to be renewed at the end of each 'period of insurance,' and that it does not fall into the very special category of contract under which the insurance persists indefinitely without the necessity for periodic renewal and without reference to the wishes of the parties. If that is the position and if this is a contract of insurance which lasts only for a year at a time and which requires at the expiry of each year to be renewed, then a new contract of insurance is entered into on each renewal, and it seems to me that on every renewal there at once arises an obligation on the insured to make such disclosure as may be necessary and proper, and to correct any statement in his original proposal form which may no longer be accurate and which may be material to the risk

for which he seeks cover during the year still to come. I find that the rule is stated on p. 429 of *Macgillivray on Insurance Law* (Second Edition) in these terms: 'In fire policies and similar risks where the insurers may decline to renew the policy at the expiration of the original period, each renewal is made on the faith of the continued truth of the original representations, and if there has been any material change adverse to the interest of the insurers which has not been disclosed on or before payment of the renewal premium, the insurers may repudiate liability or limit their liability to the amount for which they would have been liable if there had been no change.'"

Subrogation

Phœnix Assurance Co. *v.* Spooner

[1905] 2 K.B. 753

The Plymouth Corporation served a notice on Mrs. Spooner to acquire premises under the Lands Clauses Consolidation Act, 1845. Before any further steps were taken the buildings were destroyed by fire and Mrs. Spooner was paid £925 by her insurance company in settlement of the loss. Mrs. Spooner then agreed with the Corporation to give them the benefit of the insurance in fixing the compensation to be paid under the Lands Clauses Consolidation Act. The insurance company contended that they were entitled to the benefit of Mrs. Spooner's remedies and sued her for the £925 which she would have received from the Corporation if she had not renounced it. It was held that Mrs. Spooner could not pass to the Corporation the benefit of the insurance, and that the insurance company could recover the amount of the loss from her.

Subrogation

Commercial Union Assurance Co. *v.* Lister

(1874), L.R. 9 Ch. 483

The defendant was the owner of a mill which was destroyed by fire said to be due to the negligence of the Halifax Corporation. The loss was estimated at £56,000 but the insurances were for only £33,000. The owner of the mill sued the Corporation for damages, and his insurers applied to the court for an injunction to restrain him from claiming less than the full amount of the loss. The court held that he could not be deprived of his conduct of the action provided he gave an undertaking to sue for the whole amount of damage. He would be liable for any neglect of his equitable duty towards the insurers.

Subrogation

Darrell *v.* Tibbitts

(1880), 5 Q.B.D. 560

A house in Brighton was damaged by an explosion resulting from the escape of gas whilst street repairs were being undertaken by employees of the Corporation. The defendant, who was lessee of the house, being obliged to keep it in repair, claimed damages from the Corporation and expended the money in reinstatement.

The owner also claimed from his insurers (who were represented by the plaintiff) and during the negotiations, he sold the house to the lessee. In ignorance of the fact that the house had already been reinstated,

the insurers paid the new owner, but on discovering the true facts, they brought this action to recover the insurance money.

It was held that insurers were entitled to be repaid. Lord Esher said: "The doctrine is well established that where something is insured against loss either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter and with regard to every contract which touches the subject-matter insured and which contract is affected by the loss or the safety of the subject-matter insured, by reason of the peril insured against. So that immediately after the insurance company had paid the landlord they were put into his place with regard to the contract to rebuild, which was a contract respecting the subject-matter insured, that is the building . . . and, therefore, they are to be subrogated, or to be put into the place of the landlord with regard to his rights. They might have sued in his name the tenants if the latter had not repaired, and when tenants have repaired, the insurance company are to have the benefit of those repairs."

Valued Policy

Irving *v.* Manning

(1848), 6 C.B. 391, H.L.

In this marine case the House of Lords took the opinion of the Judges. They admitted that under a valued policy the assured might obtain more than an indemnity. "A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify."

APPENDIX C

GLOSSARY

Ab initio . . . From the beginning.

Accord and satisfaction . Accord is an agreement by which one of the parties is freed from an existing obligation. Satisfaction is the consideration making the agreement operative.

Administrator . . The person appointed by the court to administer the estate of an intestate, or of a testator when an executor has not been appointed or the named executor will not or cannot act.

Advowson . . . The right to present to a benefice.

Ad valorem . . . According to value.

Benefice . . . . A church living.

Bona fide . . . In good faith.

Causa proxima . . The proximate or immediate cause.

Caveat emptor . . Let the buyer beware.

Cestui que trust (*plur.* **Cestuis que trustent**) The beneficiary for whom trust property may be held.

Chattels . . . . Personal property; chattels real are leasehold interests in land, chattels personal are movable things.

Chose in action . . Property in the form of a right to sue for the enforcement of a claim.

Chose in possession . . Property being rights over something in actual possession.

Committee (*pronounced with accent on final syllable*) A person to whom the affairs of a mental patient are committed.

Conditio sine quâ non . An indispensable condition.

Consensus ad idem . . Perfect agreement.

Damages . . . Monetary compensation for loss, injury or damage. Damages are either general or special; general are those caused by the breach, irrespective of special circumstances; special are those due to the special circumstances.

De die in diem . . From day to day.

De facto . . . As a matter of fact.

De jure . . . . As a matter of law.

Delegatus non potest delegare An agent cannot delegate his authority.

Equity . . . . Rules springing from the exercise of the King's power to redress wrongs of which courts of law took no cognizance.

Estoppel	A rule of evidence preventing a person from denying facts which he has previously admitted.
Executor	A person named in a will to administer the estate of the testator.
Ex nudo pacto non oritur actio	Out of a bare promise no action can arise.
Ex parte	An action by one party in the absence of some other.
Ex turpi causa non oritur actio	No action can arise out of an immoral consideration.
Factum est	It is done.
Feme covert	A married woman.
Feme sole	An unmarried woman.
Fi. fa.	A writ of *fiera facias* for seizing the debtor's money and selling his goods.
Garnishee order . .	An order commanding a third party who owes money to a judgment debtor to pay it to the judgment creditor.
Ignorantia juris neminem excusat	Ignorance of the law excuses nobody.
In camera	In private.
In esse	In actual being.
Injunction	A writ of prohibition granted by a court.
In re	In the matter of.
Inter vivos	Between living persons.
Intestate	A person who dies without making a valid will.
In transitu	On the way: in passing.
Intra vires	Within the powers of.
Joint tenancy	Concurrent interest in property by two or more persons in the same right.
Legal personal representative	The executor or administrator of the estate of a deceased person.
Lex loci	The law of the place.
Lex mercatoria . .	Mercantile law.
Lex non scripta . .	The unwritten law or common law.
Lex scripta	Statute law.
Lien	The right to retain the property of another until certain legal demands have been satisfied.
Life tenant	A person who has a life interest in an estate.
L.S. (Locus sigilli) . .	The place of the seal.
Mala fide	In bad faith.
Merger	The merging of a provisional agreement in the final substantive contract.

Mortgage	Transfer of an interest in land as security for a debt.
Mutatis mutandis	The necessary changes being made.
Nemo dat quod non habet	No one can give what is not his.
Obiter dictum	An opinion expressed incidentally.
Omnia rite esse acta presumuntur	Everything is presumed to have been carried out legally.
Pari passu	Equally.
Pawn	Transfer of the possession of (but not the property in) goods or documents of title as security for a debt or promise.
Personalty	All property other than realty.
Pledge	See **Pawn.**
Probate	Legal recognition of the validity of a will.
Quantum meruit	As much as he has earned.
Qui facit per alium facit per se	He who acts through another acts himself
Realty	All interests in land other than leasehold interests.
Rescission	Setting aside a contract.
Res judicata	A case already decided.
Respondeat superior	Let the principal be answerable.
Settlement	An arrangement by which property is held in trust for beneficiaries in succession.
Sine die	Without fixing a day.
Sub judice	Under consideration.
Sui generis	Of its own kind.
Sui juris	Without disability.
Tenancy in common	Concurrent interests in property where tenants have distinct interests in respective parts.
Testator	A person who makes a will.
Trust	An arrangement by which property is held for the benefit of one or more beneficiaries.
Uberrima fides	The utmost good faith.
Uberrimæ fidei	Of the utmost good faith.
Ultra vires	Beyond the powers.
Ut res magis valeat quam pereat	It is better that the matter be regarded as valid than that it should be allowed to fail.

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